

MAY 15 1990

~~JOSEPH P. MURKIN, JR.~~
CLERK

No. 89-1909

(D)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

FEIST PUBLICATIONS, INC.,

Petitioner

v.

RURAL TELEPHONE SERVICE COMPANY, INC.

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

Kyler Knobbe*
Ridenour And Knobbe
Box 808
Cimarron, Kansas 67835
(316) 855-3492

James M. Caplinger, Jr.*
James M. Caplinger Chtd.
823 SW Tenth Street
Topeka, Kansas 66612-1618
(913) 232-0495

Counsel for Petitioner

Counsel for Respondent

*Counsel of Record

PETITION FOR CERTIORARI FILED MAY 29, 1990
CERTIORARI GRANTED OCTOBER 1, 1990

SPEARVILLE NEWS, INC. (316) 385-2200

TABLE OF CONTENTS

	Page
Relevant Docket Entries: District Court	1
Tenth Circuit	5
Complaint and attached Copyright Registration and Affidavit	9
Answer and Counterclaim	17
Plaintiff's Answer to Defendant's Counterclaim	27
Motion for Summary Judgment of Copyright Infringement and attached Memorandum in Support (Fact Statements Only together with Deposition of Tom Feist)	31
Defendant's Opposition to Plaintiff's Motion for Summary Judgment and Defendant's Cross Motion for Summary Judgment and Attached Memorandum in Support (Fact Statements Only)	49
Plaintiff's Reply to Defendant's Memorandum in Support of Opposition to Plaintiff's Motion for Summary Judgment and Plaintiff's Response to Defendant's Cross-Motion for Summary Judgment (Fact Statements Only)	57
Memorandum and Order by United States District Court, January 5, 1987 [Is reprinted at pgs. 5a-16a of the Appendix to the Petition for Certiorari filed herein]	-
Excerpts of Transcript of Proceedings, January 11, 1988	59

Exhibit K-1, Northwest Kansas Area Telephone Company Coverage	93
Order by United States District Court, January 13, 1988 [Is reprinted at pgs. 17a-18a of the Appendix to the Petition for Certiorari filed herein]	
Rule 54(b) Certification by United States District Court, March 21, 1988.....	95
Judgment Entered by United States District Court, March 22, 1988	97
Notice of Appeal, April 18, 1988	99
Order and Judgment by United States Court of Appeals, Tenth Circuit, March 8, 1990 [Is reprinted at pgs. 1a-4a of the Appendix to the Petition for Certiorari filed herein]	
Order of the Supreme Court of the United States granting Certiorari, limited to Question 3, presented by Petition, October 1, 1990	101

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(Before Honorable Richard D. Rogers)**

CIVIL DOCKET SHEET

Docket No. 83-4086

Plaintiff	Defendant
RURAL TELEPHONE SERVICE COMPANY, INC.	FEIST PUBLICATIONS, INC.

<u>DATE</u>	<u>NR.</u>	<u>PROCEEDINGS</u>
<u>1983</u>		
Mar 23	1	Complaint w/Affidavit of H.J. Austerman & Exhibits (EXHIBITS CONTAINED IN SEPARATE FOLIO)
Jun 2	8	ANSWER & COUNTER-CLAIM
Jun 15	14	ANSWER of pltf to deft's COUNTER-CLAIM
<u>1984</u>		
Mar 2	21	MOTION of Pltf ofr S/J of Copyright Infringement
Mar 15	25	OPPOSITION of Deft to Pltf's motion for s/j and deft's cross motion for s/j
Mar 15	26	MEMORANDUM of Deft in support of opposition to pltf's motion for s/j and in support of deft's cross motion of s/j
Apr 3	28	REPLY of Pltf to Deft's Memo in Support of Opposition to Pltf's Motion for S/J and Pltf's response to Deft's Cross-Motion for S/J
<u>1987</u>		
Jan 05	30	MEMORANDUM AND ORDER-ENTERED-ROGERS-J: Pltf's motion for s/j on its copyright infringement claim be hereby granted. Pltf shall also be awarded atty's fees on this claim. The amount of atty's fees as well as the proper measure of

damages shall be determined in the future. It is further ordered that deft's motion of s/j be hereby denied. Pltf's motion to dismiss is denied cc: to counsel

[Docket Sheet pg. 3]

FILE #3

Oct 23 65 PRETRIAL CONFERENCE ORDER-COPYRIGHT CLAIMS ONLY-ENTERED-ROGERS J: Counsel will exchange proposed exhibits & lists of witnesses & shall file w/clerk lists by 11/20/87. Pltf will prepare, file & serve 10 days prior to trial a summary of anticipated testimony of witnesses & other evidence party plans to offer; a trial brief or memorandum of law. Deft will prepare, file & serve foregoing at least 5 days prior to trial. Court finds this case is at issue. Add'l discovery can be done by agreement of the parties but any such add'l discovery shall not delay the trial of this case. Case will be tried in Topeka, Ks. ETT - 1 day cc: to counsel

Nov 19 68 Pltf's proposed exhibits & lists of witnesses

Nov 23 69 Deft's list of witnesses & list of proposed exhibits

Dec 31 72 Deft's list of witness & list of proposed exhibits

Dec 31 73 Pltf's list of witnesses, anticipated testimony & exhibits

Dec 31 74 TRIAL BRIEF of pltf on the issue of copyright infringement damages

1988

FILE #4

Jan 5 75 Deft's list of witnesses and proposed exhibits (second revision)

Jan 7 76 Deft's list of witnesses, anticipated testimony, & exhibits

Jan 7 77 TRIAL BRIEF of deft on the issue of copyright infringement damages

[Docket Sheet pg 4]

1988

Jan 11 79 TRIAL TO COURT, At Topeka, Rogers-J: Trial began & ended 1/11/88. Trial only as to copyright infringement damages. Deft's motion for reconsideration of court's ruling granting S/J on copyright issue—denied. Court finds that there was copyright infringement, but it was not willful. Damages awarded in the amount of \$6,000. Attorneys should try & reach an agreement as to attys fees. Pltf's and deft's oral motion to withdraw all exhibits—granted

ORDER-ENTERED-ROGERS-J: Judgment entered for pltf in amt of \$6,000 on its copyright infringement claim (EOD 1/13/88) cc: to counsel

Feb 10 85 Deft's notice of transcript order - transcript due 3-4-88

Feb 11 87 MOTION of deft for entry of Rule 54(b) Certification

[Docket Sheet pg 5]

Feb 26 92 Transcript of proceedings on January 11, 1988

Mar 22 97 RULE 54(b) Certification-Entered-Rogers-J: Court directs entry of final judgment as to copyright infringement claim. Judgment entered for pltf in amt of \$6,000 on copyright infringement claim & \$15,280 atty's fees on copyright infringement claim. Court expressly determines that there is no just reason for delay w/regard to copyright claim & expressly directs the Clerk to enter judgment. Every issue in the copyright part of

this matter is final as to claims of both parties (EOD 03/22/88) CC: to counsel
 Judgment on decision by the Court: Judgment entered for pltf in amt of \$6,000 on copyright infringement claim & \$15,280 atty's fees on copyright infringement claim (EOD 03/22/88) cc: to counsel
 Mar 22 98
 Apr 19 100 NOTICE OF APPEAL of Deft \$105.00 copies mailed to James M. Caplinger, Jr., Kyler Knobbe and Robert L. Hoecker, Clerk, United States Court of Appeals with copy of docket entries
 Apr 19 DOCKETING STATEMENT of the Defendant mailed to USCA
 [Docket Sheet pg 6]
1989
 Mar 13 116 LETTER from USCA dated 3/10/89, regarding designation of record on appeal and directing record be transmitted on or before 4/10/89. (Designation of Deft/Appellant & Pltf/Appellee attached.)
 Apr 5 Transmitted Record on Appeal - Volumes 1-3 (Volume 2 consists of the original attachments to pleading #1) to USCA
 Apr 14 117 RECEIPT from USCA for Record on Appeal
1990
 Apr 2 119 MANDATE-ENTERED-USCA: (EOD 4/3/90) 88-1679 Judgment of the district court is AFFIRMED.
 Jun 18 128 copies: James M. Caplinger; Kyler Knobbe LETTER from USCA stating that a petition for writ of cert was filed 5/29/90 & assigned Supreme Ct. No. 89-1909

UNITED STATES COURT OF APPEALS
 FOR THE TENTH CIRCUIT
 GENERAL DOCKET
 88-1679 Rural Telephone v. Feist Publications
 5/2/88 [179460] Civil case docketed. Preliminary record filed. Transcript order form due 4/29/88 for Debra L. Dody pursuant to R.42.1 Docketing statement due 5/12/88 for Feist Publications Appellant/ Petitioner's brief due 5/31/88 for Feist Publications Appellant's designation of record due 5/31/88 for Feist Publications (hh) [88-1679]
 [190614] Docketing statement filed by Feist Publications in 88-1679. Original and 3 copies c/s: y. Feist Publications in 88-1679 (mt) [88-1679]
 5/6/88 [181432] Notice of appearance filed by Kyler Knobbe in 88-1679 as attorney for Feist Publications is 88-1679. (lwb) [88-1679]
 5/9/88 [181750] Notice of appearance filed by James M. Caplinger in 88-1679 as attorney for Rural Telephone in 88-1679. (mt) [88-1679]
 5/31/88 [190782] Appellant's brief filed by Feist Publications in 88-1679. Original and 11 copies. c/s: yes. Served on 5/28/88 Feist Publications in 88-1679, Appellee's brief due 6/30/88 for Rural Telephone Service. (mt) [88-1679]
 6/9/88 [188100] Order filed by RLH - Transcript order form due 6/20/88 for Debra L. Dody pursuant to Rule 42., - docketing statement due 6/20/88 for Feist Publications pursuant to Rule 42. (lwb) [88-1679]
 6/13/88 [190894] Order filed by RLH - designation of record due 6/23/88 for Feist Publications pursuant to Rule 42. (mt) [88-1679]
 6/15/88 [198054] Notice filed that the transcript necessary is already on file in the district court. Debra

6/15/88	L. Dody in 88-1679 (mt) [88-1679] [198062] Designation of record filed by Appellant Feist Publications in 88-1679. Original and 1 copies. [88-1679] (mt) [88-1679]	6/14/90 [435943] Petition for writ of certiorari filed on 5/29/90 by Appellant Feist Publications. Supreme Court Number 89-1909 (mt) [88-1679]
6/27/88	[225526] Designation of record filed by Appellee Rural Telephone in 88-1679. Original and 1 copies. [88-1679] (lwb) [88-1679]	10/9/90 [460342] Supreme Court order dated 10/1/90 granting certiorari limited to Question 3 presented by the petition filed. (mt) [88-1679]
6/27/88	[225534] Appellee's brief filed by Rural Telephone in 88-1679. Original and 11 copies. c/s: y. Served on 6/24/88 Appellant's optional reply brief due 7/11/88 for Feist Publications Rural Telephone in 88-1679 (lwb) [88-1679]	
7/11/88	[233622] Appellant's reply brief filed by Feist Publications in 88-1679. Original and 11 copies. c/s: y Feist Publications in 88-1679 (lwb) [88-1679]	
	[Docket pg 5]	
3/10/89	[333234] Order filed by Judge Holloway - Record on Appeal due 4/10/89 for Richard D. Rogers pursuant to Rule 11.1. (klb) [88-1679]	
4/7/89	[339764] Record on appeal filed: 1, 2, 3 Volume(s) - Copy filed in Volume(s)(y/n): n. Vol. I - pleadings; Vol. II - ORIGINAL ATTACHMENTS; Vol. III - transcript. (lwb) [88-1223 88-1679]	
8/28/89	[371895] Hearing set for November 1989 Session, at Denver. (sls)[88-1596 88-1679 88-2045 88-2300 88-2448 88-2699]	
10/19/89	[383474] Appellant's settlement conference report filed. Original & 10 copies (mt) [88-1679]	
11/16/89	[388863] Case argued and submitted to Judges Tacha, Ebel, Kane. (dvc) [88-1679]	
3/8/90	[412677] Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Unpublished. Tacha, authoring judge; Ebel, panel member; Kane, panel member. [88-1679] (klb) [88-1679]	
3/30/90	[41787] Mandate issued. Mandate receipt due 4/30/90 Record on appeal return due 7/30/90 (klb) [88-1679]	
4/4/90	[420003] Mandate receipt filed. (klb) [88-1679]	

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RURAL TELEPHONE SERVICE)
COMPANY, INC.,)
Plaintiff)
vs) Civil Action File
FEIST PUBLICATIONS, INC.,)
Defendant.) No. 83-4086

COMPLAINT

COMES NOW the plaintiff, Rural Telephone Service Company, Inc. and for its complaint states:

1. Plaintiff brings this action in copyright infringement. Plaintiff charges that defendant copied in a telephone directory published by the defendant, listings from plaintiff's copyrighted telephone directory in violation of the Copyright Act of 1909. 17 U.S.C.A. §1 et seq. Plaintiff seeks damages, accounting, temporary and permanent injunctive relief.
2. Plaintiff brings this action pursuant to 28 U.S.C.A. §1338(a), which grants this court original and exclusive jurisdiction over civil actions arising under the copyright statutes.
3. Plaintiff, Rural Telephone Service Telephone Company, Inc., is a corporation duly organized and existing under the laws of the State of Kansas to transact the business of a public utility.
4. Defendant, Feist Publications, Inc., is a corporation duly organized and existing under the laws of the State of Kansas. The registered agent for service of process is Tom Feist, 106 Stafford, Box 216, Spearville, Kansas, 67876.

5. Plaintiff, as a part of its service offering, annually publishes and distributes directories to its customers in its telephone exchange areas. The directory which plaintiff alleges defendant copied was published by plaintiff in September 1982, for use by its customers for the remainder of 1982 and part of 1983.

6. Defendant's telephone directory contains material wholly original with plaintiff and is copyrightable subject matter under the laws of the United States.

7. Plaintiff complied in all respects with 17 U.S.C. §210 (1976) (1909 Act) and all other laws governing copyright and secured the exclusive rights and privileges in and to the copyright of said directory and received from the Register of Copyrights a certificate of registration dated and identified and is hereto attached as "Exhibit 1."

8. Said directory has been published and all copies of it made by plaintiff or under its authority or license have been printed, bound, and published in strict conformity with the provisions of 17 U.S.C. (1976 Ed.) §20 and all other laws governing copyright.

9. Plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the copyright in said telephone directory.

10. Defendant infringed said copyright by publishing and placing upon the market a telephone directory entitled "Northwest Kansas AREA-WIDE Telephone Directory" which was copied largely from plaintiff's copyrighted telephone directory. (Affidavit attached)

11. A copy of plaintiff's copyrighted telephone directory is hereto attached as "Exhibit 2" and a copy of defendant's infringing telephone directory is hereto attached as "Exhibit 3."

12. After January 15, 1983, and continuously since, defendant has been publishing and marketing the "Northwest Kansas AREA-WIDE Telephone Directory" (Exhibit 3) and has thereby been engaging in copyright infringement to plaintiff's irreparable damage.

WHEREFORE, plaintiff demands that:

1. defendant be enjoying during the pendency of this action and permanently from infringing said copyright of said plaintiff in any manner and from publishing, marketing or otherwise disposing of any copies of the infringing telephone directory (Exhibit 3);

2. defendant be required to pay to plaintiff such damages as plaintiff has sustained in consequent of defendant's infringement of said copyright and to account for all gains, profits and advantages derived by defendant by his infringement of plaintiff's copyright or such damages as to the court shall appear proper within the provisions of the copyright statutes;

3. defendant be required to deliver up to be impounded during the pendency of this action all copies of said telephone directory entitled "Northwest Kansas AREA-WIDE Telephone Directory" in its possession or under its control;

4. defendant pay to plaintiff the costs of this action and reasonable attorney's fees to be allowed to the plaintiff by the court; and

5. plaintiff have such other and further relief as the court deems equitable.

/s/ James M. Caplinger, Jr.

**JAMES M. CAPLINGER, CHARTERED
823 West Tenth Street
Topeka, Kansas 66612
(913) 232-0495**

**Attorney for Plaintiff
Rural Telephone Service
Company, Inc.**

CERTIFICATE OF COPYRIGHT® REGISTRATION

This certificate issued under the seal of the Copyright Office in accordance with the provisions of section 410(a) of title 17, United States Code, attests that copyright registration has been made for the work identified below. The information in this certificate has been made a part of the Copyright Office records.

One less

REGISTER OF COPYRIGHTS
United States of America

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

TITLE OF THIS WORK • Agra, Alton, Arrol, Collyer, Asar, Dimond, Fairlie, Gaylord, Love, Mayfield, Jennings, Kensington, Lenora, Logan, Long Island, Merland, Merton, Oimits, Palco, Prairie View, Penford, Sheldon, Victoria, Woodruff, Woodston, Zerlin. Including listings for Alta, Alberta, Idaho, British Columbia, and
PREVIOUS OR ALTERNATIVE TITLES •

PUBLICATION AS A CONTRIBUTION If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. Title of Collective Work: *9*

If published in a periodical or serial give Volume # Number # Issue Date # On Page #
15 1982-1983 28044

NAME OF AUTHOR □ DATES OF BIRTH AND DEATH
Year Born □ Year Died □
a Rural Telephone Service Company Inc.

Was the contribution to the work a "work made for hire"?

NATURE OF AUTHORSHIP Briefly describe nature of the material covered by this author in which copyright is claimed.

NAME OF AUTHOR * **DATES OF BIRTH AND DEATH**
Was Born ***** Year Died *****

**Has the contribution to the work a
work made for hire? Yes No**

NATURE OF AUTHORSHIP: Briefly describe nature of the research reported in this article, including contributions of all authors.

NAME OF AUTHOR * **DATES OF BIRTH AND DEATH**

WAS THIS CONTRIBUTION TO THE WORK A **AUTHOR'S NATIONALITY OR DOMICILE** **WAS THIS AUTHOR'S CONTRIBUTION TO**

THE WORK
Actual Hours _____
Estimated Hours _____
Comments _____

NATURE OF AUTHORSHIP Briefly describe nature of the material created by the author in which copyright is claimed. *

YEAR IN WHICH CREATION OF THIS
WORK WAS COMPLETED 1950 DATE AND NATION OF FIRST PUBLICATION OF THIS PARTICULAR WORK
September 1952

COPYRIGHT CLAIMANT(S) Name and address must be given even if the claimant is the same as the author given in space 2-9.
Rural Telephone Service Company, Inc.

ONE DEPOSIT RECEIVED

TWO DEPOSITS RECEIVED

TRANSFERS If the claimants/named here in space 4 are different from the author(s) named in space 2, give a brief statement of how the claimants obtained ownership of the copyright. *

"EXHIBIT 1, PAGE 1"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

11 1-005-875

EXAMINED BY	FORM TA
CHECKED BY	
<input type="checkbox"/> CORRESPONDENCE	FOR COPYRIGHT OFFICE USE ONLY
<input checked="" type="checkbox"/> DEPOSIT ACCOUNT	Printed 1-80
DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET	
A. WORKS MADE FOR HIRE: This application relates to a work in the course of business, or to a work made at the direction of another.	
<input type="checkbox"/> Yes. If yes, check if the work is a work made for hire requiring filing. Check appropriate box. <input type="checkbox"/>	
This is the new published edition of a work previously registered or unregistered.	
This is the first application submitted by the author as copyright claimant.	
This is a revised version of the work, as shown by space 6 on the application.	
If no answer to 1a, give Previous Registration Number <input type="checkbox"/> Year of Registration <input type="checkbox"/> 1981	
B. DERIVATIVE WORK OR COMPLIATION: Complete both space 6 & 8 for a derivative work, complete only 8 for a compilation.	
Promising Material: Mention any promising work or works that this work is based on or incorporates. <input type="checkbox"/>	
Material Based on This Work: Write a brief general statement of the material that has been added to this work and in which copyright is claimed. <input type="checkbox"/>	
Revisions, additions, and deletions <input type="checkbox"/>	
C. MANUFACTURERS AND LOCATIONS: If this is a published work consisting predominantly of nondramatic literary material in English, the law may give the copies be manufactured in the United States or Canada for full protection. If so, the names of the manufacturers who performed certain services and the places where these processes were performed must be given. See instructions for details.	
St. Petersburg Printing Company <input type="checkbox"/> Place of Manufacture <input type="checkbox"/> 11875 St. South <input type="checkbox"/> St. Petersburg, FL 33712 <input type="checkbox"/>	
D. PRODUCTION FOR USE OF BLIND OR PHYSICALLY HANDICAPPED INDIVIDUALS: A signature on this form in space 10 and a check in one of the boxes here or space 8, constitutes a non-exclusive grant of permission to the Library of Congress to reproduce and distribute orally for the blind or physically handicapped and under the conditions and limitations prescribed by the regulations of the Copyright Office. (1) copies of the work identified in space 1 (the application or title); or (2) phonorecords containing a fraction of a reading of that work, or (3) both.	
<input type="checkbox"/> Copies and Phonorecords <input type="checkbox"/> Copies Only <input type="checkbox"/> Phonorecords Only <input type="checkbox"/> See instructions	
E. DEPOSIT ACCOUNT: If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account <input type="checkbox"/> Name <input type="checkbox"/> Account Number <input type="checkbox"/> DAC-56154	
F. CORRESPONDENCE: Give name and address to which correspondence about the application should be sent. Name Address Appt City State Zip <input type="checkbox"/>	
G. SIGNATURE: I, the undersigned, hereby certify that I am the <input type="checkbox"/> Author <input type="checkbox"/> Other copyright claimant <input type="checkbox"/> Owner of exclusive rights <input checked="" type="checkbox"/> Authorized agent of Rural Tel. Service Co., Inc. Name of author or owner, copyright claimant or authorized agent <input type="checkbox"/> Date <input type="checkbox"/> 10/30/82	
H. Handwritten signature (if <input type="checkbox"/> <i>Bonita Witczak</i>) <input type="checkbox"/> DEC 4 1980	
I. All entries are true to the best of my knowledge. <input type="checkbox"/>	
J. Signature <input type="checkbox"/> Name <input type="checkbox"/> GTE Directories Corporation Bonita Witczak <input type="checkbox"/> Number <input type="checkbox"/> Address <input type="checkbox"/> 1865 Miner St. <input type="checkbox"/> City <input type="checkbox"/> State <input type="checkbox"/> ZIP Des Plaines, IL 60016 <input type="checkbox"/> Date <input type="checkbox"/> 10/30/82 <input type="checkbox"/> Name of Copyright Office <input type="checkbox"/> Library of Congress Washington DC 20590	

"EXHIBIT 1, PAGE 2"

14

RURAL TELEPHONE SERVICE)
COMPANY, INC.,)
Plaintiff)
vs.) Civil Action File
FEIST PUBLICATIONS, INC.,) No. _____
Defendant.)

AFFIDAVIT OF H.J. AUSTERMAN

I, H.J. Austerman, being of lawful age and being first duly sworn, depose and state:

1. That in 1977 I was the General Manager of Rural Telephone Service Company, Inc., and still hold that position as of this date.

2. That annually since 1977 I have caused a Rural Telephone Service Company telephone directory to be published and copyrighted with the United States Copyright Office, by Leland Mast Directory Company, 11875 West 85th Street, Lenexa, Kansas 66214.

3. That in 1980, because of many complaints, an evaluation of the defendant's "Northwest Kansas AREA-WIDE Telephone Directory" was made and Rural was convinced that Rural Telephone's copyright of its own telephone directory was infringed.

4. That on March 20, 1980, a letter was sent at my direction to defendant, Feist Publications, Inc., informing them of the above evaluation and possible copyright infringement litigation. No lawsuit was brought.

15

5. That in 1982 Rural again became suspicious of possible copyright infringement of Rural Telephone's directory on the part of defendant, Feist Publications, Inc. To verify this suspicion Rural caused the following four (4) fictitious listings to be listed in Rural's 1982 telephone directory:

Austerman, Ron R.	Car Phone	567-4609
Rooney, Martha	Palco	737-2119
Stow, Jack	Rexford	687-2009
Worthington, L.L.	Zurich	662-3209

6. That on January 15, 1982, the four (4) fictitious names listed above were present in defendant's "Northwest Kansas AREA-WIDE Telephone Directory." Therefore, Rural was convinced of copyright infringement and is now seeking damages, accounting, temporary and permanent injunctive relief.

FURTHER AFFIANT SAYETH NOT.

/s/ H.J. Austerman

STATE OF KANSAS)

) ss:

COUNTY OF SHAWNEE)

H.J. Austerman, of lawful age, being first duly sworn on oath states: that he is an employee of the plaintiff in the above-captioned matter; that he has read the foregoing Affidavit and that the statement made therein are true, and correct to the best of his knowledge and belief.

/s/ H.J. Austerman

Subscribed and sworn to before me this 23rd day of March, 1983.

/s/ Notary Public

My Appointment Expires:
September 23, 1984.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RURAL TELEPHONE SERVICE)	
COMPANY, INC.)	
) Plaintiff
)
) Civil Action
v.)) No. 83-4086
FEIST PUBLICATIONS, INC.,)	
)
) Defendant
)

ANSWER AND COUNTER-CLAIM

Defendant, Feist Publications Inc., for its answer and counter-claim states as follows:

1. Admits under paragraph 1 of the complaint that plaintiff purportedly brings this action for copyright infringement and seeks damages, accounting, temporary and permanent injunctive relief, but denies the remaining allegations of paragraph 1 of the complaint and specifically denies that defendant in any way violated the provisions of the Copyright Act of 1909.

2. Admits that paragraph 2 of the complaint purports to state the statutory basis for jurisdiction of plaintiff's complaint.

3. Defendant is without specific knowledge of the accuracy of the allegations of paragraph 3 of the complaint but assumes for purposes hereof that those allegations are correct and plaintiff is indeed a licensed public utility.

4. Defendant admits the allegations of paragraph 4 of the complaint.

5. Defendant admits the allegation of paragraph 5 of the complaint that plaintiff annually issues a telephone directory, but avers that as opposed to a service offering, it is done pursuant to a required directive of the State Corporation Commission of Kansas (see Exhibit A attached). With regard to the second sentence of paragraph 5 of the complaint, defendant specifically denies any copying and is further without sufficient information or knowledge to admit or deny exactly when plaintiff's directory was published or used and therefore denies the second sentence of paragraph 5 of the complaint.

6. Defendant denies the allegations of paragraph 6 of the complaint.

7. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the complaint and therefore puts plaintiff to the proof thereof, as if the same were denied.

8. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the complaint and therefore puts plaintiff to the proof thereof, as if the same were denied.

9. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the complaint and therefore puts plaintiff to the proof thereof, as if the same were denied.

10. Defendant denies the allegations of paragraph 10 of the complaint.

11. Defendant admits that copies of plaintiff's and defendant's directories are attached to the complaint as averred in paragraph 11 of the complaint but specifically denies that defendant's directory is an "infringing telephone directory" and denies that plaintiff's directory is a validly "copyrighted telephone directory."

12. With regard to paragraph 12, defendant generally denies the allegations thereof and specifically denies that it is engaged in any copyright infringement to plaintiff's damage. Defendant avers that its 1983 "Northwest Kansas AREA-WIDE Telephone Directory" (Exhibit 3) bears a copyrighted publishing date of December 15, 1982. (See defendant's certificate of copyright registration, Exhibit B attached.) Defendant further avers that substantially all (97%) of its directories published were distributed free to the public by December 31, 1982.

FIRST AFFIRMATIVE DEFENSE

13. Plaintiff's complaint fails to state a claim upon which relief can be granted. The compilation of names and phone numbers in plaintiff's directory is mandated under state law, dedicated to the public, and therefore not copyrightable subject matter under the laws of the United States.

SECOND AFFIRMATIVE DEFENSE

14. Defendant is not liable for copyright infringement under the Fair Use Doctrine (17 USC §107).

THIRD AFFIRMATIVE DEFENSE

15. Plaintiff is barred in its attempt to prosecute its complaint by the Doctrine of Copyright Misuse and Unjust Enrichment.

DEFENDANT'S COUNTER-CLAIM

16. Defendant brings this counter-claim pursuant to 15 USC §§15 and 26 for anti-trust (15 USC §2) violations by plaintiff. Defendant contends that plaintiff's refusal to grant defendant a copyright license on reasonable terms or other access to telephone listing information is an unlawful extension of plaintiff's telephone service and potential copyright monopolies into the yellow page advertising market, all in violation of 15 USC §2. Defendant seeks triple damages, costs, reasonable attorneys fees, interest, and injunctive relief.

17. This court has jurisdiction pursuant to 28 USC §1337.

18. Defendant, Feist Publications, Inc., is a Kansas corporation having its principal place of business at Spearville, Kansas. Defendant has since 1978, annually published three (four since 1980) AREA-WIDE telephone directories in the rural areas of Western Kansas. Their purpose is to benefit the rural residents of the State of Kansas by combining into one telephone directory all of the various telephone listings from differing telephone exchanges within that particular trade area. A copy of defendant's Northwest Kansas AREA-WIDE Telephone Directory for 1983 is attached to plaintiff's complaint as Exhibit 3. A map depicting the trade areas served by defendant's directories is shown at page 2 of the red Community Interest Pages of that directory.

19. Plaintiff, Rural Telephone Service Company, Inc., purports to be a Kansas corporation authorized to provide telephone service as a public utility (Complaint, paragraph 3). Plaintiff provides telephone service to Northwest Kansas communities (see Exhibit 2) which includes, among others, communities served by defendant's directory.

20. White page listings (hereinafter "white pages") are listings of names, partial or full addresses, and phone numbers of telephone service customers. Both plaintiff's directory and defendant's directory contain such a "white pages" section.

21. Yellow page business advertising listings (hereinafter "yellow pages") consist of listing of various businesses in the telephone service area combined with advertising of these same businesses. Plaintiff and defendant both publish such "yellow pages" as part of their respective directories.

22. Defendant obtains all of its white page listing information with the exception of listings serviced by plaintiff through license agreements with the various telephone companies serving the area covered by defendant's Northwest

Kansas AREA-WIDE directory. (See Exhibit 3, page 2 of the white pages.) These listings are then updated just prior to publication of defendant's directory. For plaintiff's telephone exchanges defendant must utilize independent or in-house verifiers to obtain current listings by random dialing of possible numbers in the exchange, by postal mailings to phone subscribers requesting current numbers, and reference to the then current telephone directory covering that exchange.

23. Defendant first requested a license agreement covering plaintiff's telephone listings in 1978 on terms comparable to license agreements entered into with other telephone companies. Plaintiff refused. Defendant has since that time continued to inquire either personally or through acquaintances common to both plaintiff and defendant about obtaining such a license agreement. Plaintiff continues to refuse to allow any such license agreement.

24. The acts of plaintiff, including those acts complained of herein, have a substantial effect on interstate trade and commerce, in that among other things, plaintiff provides telephone service that is interstate in nature, plaintiff shares revenue from business advertising in its "yellow pages" with persons who have substantial operations in interstate commerce, and "yellow pages" are utilized by the public to purchase goods which are traded in interstate commerce.

25. The relevant product market herein is "yellow pages" advertising which is a separate market or submarket within the overall advertising market in the United States. The relevant geographic market is the plaintiff's telephone service area where plaintiff supplies telephone service. These relevant product market and relevant geographic market are hereinafter referred to as the "relevant market."

26. Defendant distributes its Northwest Kansas AREA-WIDE Telephone Directory, and similar directories in other parts of Kansas and Oklahoma to residences and businesses in the communities listed in the directories, including com-

munities in the relevant market, free of charge. A few are later sold by orders at a nominal charge, however, defendant derives almost all its income solely from the sales of "yellow pages" advertising.

27. At all times relevant herein, plaintiff has been granted an exclusive telephone service franchise by the State of Kansas in the Northwest Kansas area serviced by its exchanges. In effect, plaintiff has been granted a monopoly on telephone service in these areas and, as a result of that, it has acquired a monopoly in the yellow pages of business advertising market in the same area. Plaintiff's monopoly in yellow pages advertising subsists within its telephone service monopoly owing to the fact that yellow pages advertising cannot be effectively sold in a directory if such advertising is not coupled with white page telephone listings. Plaintiff is the only entity in a position to compile such white page listings by virtue of plaintiff's telephone service monopoly. In seeking copyright for its white page listings, plaintiff has effectively foreclosed the yellow pages advertising market to any competition, and is specifically attempting to foreclose defendant from such market.

28. Plaintiff dominates, controls, and monopolizes and has attempted to monopolize the sale of yellow pages advertising in a relevant market. Beginning at least from the date of defendant's original request for a license agreement from plaintiff in 1978, and continuing through the date of this counter-claim, plaintiff has had a market share approaching one hundred percent of the relevant market. Plaintiff has attempted to acquire, and has acquired, monopoly power in the relevant market by engaging in the following acts among others:

- (a) Refusal to allow defendant use of its white page listings;
- (b) Acquiring, maintaining, and misusing copyrights on its telephone service directories;
- (c) Disparaging defendant's products and services and thereby misleading businessmen in the relevant

market in an attempt to foreclose defendant from such market;

- (d) Foreclosing defendant from procuring sales of "yellow pages" advertising in the relevant market;
- (e) Establishing, fixing, and maintaining artificially high rates or charges for such "yellow pages" advertising;
- (f) Eliminating and discouraging new competition in the relevant market;
- (g) Establishing a single non-competitive provider of "yellow pages" in the relevant market;
- (h) Inhibiting, boycotting, and preventing expansion or development of directories which could provide effective competition in the cost and quality of "yellow pages" advertising in the relevant market.

29. The foregoing acts by plaintiff have had and will continue to have, if not enjoined, the following anti-competitive effects, among others:

- (a) Trade and commerce in the providing of "yellow pages" advertising have been and will be unreasonably restrained;
- (b) Competition among companies providing "yellow pages" advertising in the relevant market have been and will be substantially hindered or eliminated;
- (c) Defendant has been substantially hindered in its ability to compete with plaintiff and may be eliminated entirely as a supplier of "yellow pages" advertising at a low cost to businesses in the relevant market;
- (d) Prices for advertising in the relevant market have been and will continue to be maintained at artificially high levels.

30. In furtherance of the foregoing acts, plaintiff has acted with the purpose or intent to exercise a monopoly power in the relevant market.

31. The foregoing acts and conduct of plaintiff are a

violation of 15 USC §2 and by reason of such acts and conduct, defendant has sustained irreparable harm of a continuing nature and injury to its business and property in the following respects, among others:

- (a) Defendant has been substantially hindered in its ability to compete with plaintiff in the relevant market and may be eliminated entirely as a supplier of "yellow pages" advertising in such market;
- (b) Defendant has lost profits due to being foreclosed and hindered in its attempts to sell "yellow pages" advertising in the relevant market;
- (c) Defendant has suffered a loss of good will with customers in the relevant market.

32. By reason of the foregoing, defendant continues to suffer irreparable harm and has sustained damage and injury to its business and property in an amount believed to be in excess of Ten Thousand Dollars (\$10,000).

PRAYER FOR RELIEF

WHEREFORE, defendant, Feist Publications, Inc., prays the Court for judgment against plaintiff as follows:

- 1. Dismissing plaintiff's pretended complaint with prejudice and on the merits;
- 2. Holding that the foregoing monopoly or attempt to monopolize as set out in defendant's counterclaim be adjudged to be a violation of federal anti-trust law (15 USC §2) and that pursuant to 15 USC §15 defendant recover triple the damages determined to have been sustained as a result of the conduct of the plaintiff complainant herein, simple interest on defendant's actual damages for the period beginning on the date of service of this pleading, and that pursuant to 15 USC §26 defendant be further entitled to injunctive relief;
- 3. For an order compelling plaintiff to supply defendant at a reasonable cost with all listings of plaintiff's telephone service customers updated to include additions and deletions so that the public can be supplied with current listing information;

4. For an order that defendant recover from plaintiff the costs of this suit, including reasonable attorney's fees in accordance with the appropriate anti-trust laws;

5. That defendant have such other and further relief as the court may deem just and proper.

DATED: May 31, 1983.

/s/ Kyler Knobbe

Kyler Knobbe
Box 808
Cimarron, Kansas 67835
(316) 855-3492
Lawyer for Defendant

OF COUNSEL:

Ridenour And Knobbe
Box 808
Cimarron, Kansas 67835
(316) 855-3492

[Certificate of Service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RURAL TELEPHONE SERVICE)
COMPANY, INC.,)
Plaintiff)
vs) Civil Action
FEIST PUBLICATIONS, INC.,) File No. 83-4086
Defendant)

**PLAINTIFF'S ANSWER TO
DEFENDANT'S COUNTERCLAIM**

COMES NOW, Plaintiff, Rural Telephone Service Company, Inc. and for its answer to defendant's counterclaim denies each and every allegation therein contained except as may be specifically admitted and further alleges and states:

1. Admits under paragraph 16 of the counterclaim that defendant purportedly brings this counterclaim pursuant to 15 U.S.C. §15 and 26 for violations of antitrust (15 U.S.C. §2) by plaintiff, and seeks treble damages, costs, reasonable attorney's fees, interest and injunctive relief, but denies the remaining allegations of paragraph 16 of the counterclaim and specifically denies that plaintiff in any way violated §2 of the Sherman Anti-Trust Act (15 U.S.C. §2).
2. Admits that paragraph 17 of the complaint purports to state the statutory basis for jurisdiction of defendant's counterclaim.
3. Plaintiff admits to those allegations found in paragraph 18, except for the third sentence of paragraph 18 of the counterclaim, which Plaintiff specifically denies.

4. Plaintiff admits the allegations of paragraphs 19, 20, and 21 of the counterclaim.

5. Plaintiff is without sufficient information or knowledge to admit or deny the accuracy of the allegations of paragraph 22 of the counterclaim and therefore denies paragraph 22 of the counterclaim.

6. Plaintiff admits to allegations of paragraph 23 of the counterclaim.

7. Plaintiff denies the allegations of paragraphs 24 and 25 of the counterclaim.

8. Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 26 of the counterclaim and therefore puts defendant to the proof thereof, as if the same were denied.

9. Plaintiff admits that at all times relevant herein plaintiff has been granted an exclusive telephone service franchise by the State of Kansas in the Northwest Kansas area serviced by its exchanges as averred in the first sentence of paragraph 27 of the counterclaim, but specifically denies the remaining allegations in paragraph 27 of the counterclaim.

10. Plaintiff denies the allegations of paragraphs 28, 29, 30, 31, and 32 of the counterclaim.

AFFIRMATIVE DEFENSE

11. Defendant's counterclaim fails to state a claim upon which relief can be granted. Absent any purpose or design to create or maintain a monopoly, the Sherman Anti-Trust Act (15 U.S.C. §1 et seq) does not restrict the rights of a telephone company engaged in an entirely private business, from freely exercising its own independent discretion as to the parties with whom it will deal.

WHEREFORE, having fully answered the counterclaim of defendant, plaintiff prays they take nothing thereby; that it be given judgment for its costs and expenses, including reasonable attorney's fees; and for such other and further relief as the Court deems just.

/s/ James M. Caplinger, Jr.

JAMES M. CAPLINGER, CHARTERED
823 West Tenth
Topeka, Kansas 66612
(913) 232-0495

Attorney for Plaintiff

[Certificate of Service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RURAL TELEPHONE SERVICE)
COMPANY, INC.,)
)
 Plaintiff)
)
 vs) Civil Action
) No. 83-4086
FEIST PUBLICATIONS, INC.,)
)
 Defendant.)

**MOTION FOR SUMMARY JUDGMENT
OF COPYRIGHT INFRINGEMENT**

COMES NOW the Plaintiff, Rural Telephone Service Company, Inc., by and through its attorneys and hereby moves the court pursuant to Rule 56 F.R.C.P., for partial summary judgment in favor of Plaintiff and against the Defendant, Feist Publications, Inc., based on liability for copyright infringement as follows:

1. Plaintiff has a valid and subsisting copyright registration for its telephone directory published in 1982-1983.
2. Defendant has published a 1983 Northwest Kansas AREA-WIDE Telephone Directory in which Defendant has copied portions of Plaintiff's copyrighted directory.
3. There is no genuine issue of any material fact concerning infringement and Plaintiff is entitled to a judgment of infringement liability as a matter of law.

A memorandum in support of this motion is attached and filed concurrently herewith.

[Jurat and Certificate of Service omitted in printing]

**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT OF
COPYRIGHT INFRINGEMENT**

INTRODUCTION

Plaintiff, Rural Telephone Service Company, Inc., (hereinafter "Rural") has charged Defendant, Feist Publications, Inc., (hereinafter "Feist") with infringement of its copyrighted 1982-1983 telephone directory which it has published, as a result of Feist publishing its Northwest Kansas AREA-WIDE Telephone Directory for the year 1983. Defendant answers to interrogatories, and the testimony of its officers during their depositions established that Feist copied a quantity of material from Rural's copyrighted directory. This copying, coupled with a showing that Rural is the owner of the copyright, makes out a case of copyright infringement.

UNCONTROVERTED FACTS

1. Plaintiff, Rural Telephone Service Company, Inc. (Rural), is a Kansas corporation, duly organized and existing under the laws of the State of Kansas to transact the business of a public utility. Rural has its offices and its principal place of business in Lenora, Kansas 67654.
2. In the normal course of its business, Plaintiff, Rural, among many other things, compiles, prepares, publishes, and distributes telephone directories covering the geographical areas in which it provides telephone service.
3. The telephone directories published by Plaintiff, Rural, have been copyrighted and the copyrights have been registered each year as published. The 1982-1983 published directory, which is the subject of this lawsuit, is marked with an appropriate copyright notice, identifying Rural Telephone Service Company, Inc. as the copyright proprietor and indi-

cating the year of publication. (Attached to Plaintiff's Complaint as Exhibit #1, 2)

4. Plaintiff, Rural's, telephone directories are printed partly on white pages and partly on yellow pages. The portion printed on white pages lists in alphabetical order the names, addresses and telephone numbers of Rural's telephone subscribers. The portion printed on yellow pages lists Rural's business subscribers alphabetically under appropriate business classifications and contains classified advertisements of various sizes purchased by Rural's business subscribers.

5. Defendant, Feist Publications, Inc. (Feist) is a Kansas corporation with its principal place of business at P.O. Box 98, Spearville, Kansas 67876. Feist is a family corporation of which Tom Feist and his wife, Roberta Feist, each have a fifty percent ownership interest. Tom Feist is President of Feist Publications, Inc., and is its chief executive officer. Feist was formed and incorporated in 1977.

6. In 1978 Feist published its first Northwest Kansas AREA-WIDE Telephone Directory. Feist started this process by attempting to enter into license agreements with various telephone companies in Northwest Kansas serving the area covered by the Northwest Kansas AREA-WIDE Telephone Directory. Through these license agreements with the telephone companies, the telephone companies agreed to annually sell Feist a list of their white page listings to be used by Feist in their Northwest Kansas AREA-WIDE Telephone Directory. A number of telephone companies in the area covered by the various area-wide directories have not entered into license agreements with Feist. (Dep. Tom Feist, p. 39, 40 attached to this motion.)

7. On April 24, 1978, Tom Feist attended a Rural Telephone Company's special trustee meeting to discuss the possible purchase of Rural's white page listings. After discussion, the Board of Directors voted not to sell the listings to Feist. (Attached to this Motion as Exhibit "A".)

8. Feist, in 1978, unable to purchase the Rural white page listings, took the Rural Telephone Directory and edited it by taking out all of the listings they could not use and using the remainder of the Rural Telephone Directory. Once this was done Feist sorted these listings out by town and alphabetized them. (Dep. Tom Feist, p. 10, 14 attached to this motion.)

9. Feist then sent the various lists, broken down by towns, to verifiers it had hired in each of the towns that the directory would cover, with instructions to telephone each of the listings taken from the Rural copyrighted directory, and to attempt to verify each name, address and telephone number. After each verifier had carried out his or her instructions they sent the list back to Feist with pencilled in notes, reflecting deletions, additions and any other changes. Concurrently with the work of the verifiers, salesmen working for Feist solicited ads for the yellow page section of the Feist directory. The ads thus purchased appeared in printed form in the yellow page section of Feist's 1978 Northwest Kansas AREA-WIDE Telephone Directory which were delivered to people living in various Northwest Kansas counties.

10. In the following years, 1979 through 1982, Feist published annual Northwest AREA-WIDE Telephone Directories. Tom Feist, at the time of his deposition in this lawsuit, testified that Feist had no reason to use Rural's telephone directory after the first year. Feist instead would start each year with an updated version of the Northwest Kansas AREA-WIDE Telephone Directory from the previous year and make its additions and deletions through the use of verifiers. (Dep. Tom Feist, p. 14 attached to this motion.)

11. In 1983 Feist decided to change its date of publication, changing the date of the publication of the Northwest Kansas AREA-WIDE Telephone Directory. (Dep. Tom Feist, p. 15, 16 attached to this motion.)

12. Because of this time change Feist was in "a big hurry because of the time element involved." (Dep. Tom Feist, p. 34, 35 attached to this motion.) Tom Feist testified that it made it possible to use the Rural telephone directory once again. (Dep. Tom Feist, p. 15 attached to this motion.) An edited version of a portion of Rural's interlocking directory was computered keyed to obtain an alphabetical print-out of each town Feist included in its directory. (Defendant's Answer to Plaintiff's Interrogatories to Defendant, Answer 6)

13. Feist, in 1983, just as it had done in 1978, began with a Rural telephone directory, edited out all of the listings it could not use and compiled a list that it could use and sent the lists to verifiers to be verified. When asked why Feist went back to using the Rural directory, Tom Feist testified in his deposition that the decision was made, because "we had a chance to use it where we didn't in the past." (Dep. Tom Feist, p. 22 attached to this motion)

14. Rural Telephone Service Company, suspicious of Feist infringing its copyright, inserted in its 1982-1983 telephone directory a number of fictitious listings. When Feist's 1983 Northwest Kansas AREA-WIDE Telephone Directory was published and disseminated, the 4 fictitious listings that were inserted in Rural's 1982-1983 telephone directory appeared in the Feist directory. (Affidavit of H.J. Austerman attached to this motion.)

[Legal Argument and Authorities and
Jurat and Certificate of Service omitted in printing]
[Deposition of Tom Feist as attached by Plaintiff follows]

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF KANSAS
3 RURAL TELEPHONE SERVICE)
4 COMPANY, INC.,)
5 Plaintiff,)
6 -vs-) Civil Action
7 FEIST PUBLICATIONS, INC.,) No. 83-4086
8 Defendant.)
9
10

11 DEPOSITION
12 THE DEPOSITION OF TOM FEIST, a witness herein,
13 taken on behalf of the plaintiff, pursuant to agree-
14 ment before
15 Susan K. Byrum Zimmerman, a Certified Shorthand
16 Reporter of
17 Kansas, at Cimarron, Kansas, on the 16th day of
18 September,
19 1983, at 9:00 o'clock a.m.

20 APPEARANCES
21 Plaintiff appeared by its attorney, MR. JAMES M.
22 CAPLINGER, JR., of James M. Caplinger, Char-
23 tered, Attorneys at
24 Law, 823 West Tenth Street, Topeka, Kansas 66612.
25 Defendant appeared by its attorney, MR. KYLER
 KNOBBE,
 of Ridenour & Knobbe, Attorneys at Law, P.O. Box
 808,
 Cimarron, Kansas 67835.

- 1 A. How do we hire them or what do we cover?
- 2 Q. Not so much on how you hire them, but do you give them
- 3 blank survey cards or what list do you give them? Do you
- 4 give them a Rural Telephone Directory and let them have at
- 5 it or what do you do?
- 6 A. We have done it--of course, we have computerized since
- 7 that time. I have got to go back in my memory. What we
- 8 did then and basically what we still do is, yes, we take
- 9 the Rural directory, edit it, take out all the listings we
- 10 can't use--the foreign listings. For example, Galatia,
- 11 Kensington. Those that we do not include in our
- 12 directory are deleted. We take out government schools, anything
- 13 else--foreign advertisers, clean it up. It's an
- 14 interlocking directory. So we have to sort the listings
- 15 out by town and alphabetize them, because our is an
- 16 interlocking directory. And once this list is compiled,
- 17 we send it to the verifiers with instructions on what to
- 18 do.
- 19 Q. Do you remember approximately how many verifiers you had
- 20 for that area?
- 21 A. One for every town.
- 22 Q. One for every town?
- 23 A. There area a few towns that have--we call it, "EAS."
- 24 Q. Extended Area Service?
- 25 A. In those instances, such as Prairie View, Logan and such--

- 1 past. We also began to--and it's a little bit of a complicated process, but we began to check out listings from the post office through independent research.
- 2 Q. You used other resources?
- 3 A. Yes. We used other resources.
- 4 Q. Okay. But still, in those years you started out with an unedited version of Rural Telephone Directory?
- 5 A. Right.
- 6 Q. And do you still each year, say like for this particular --
- 7 do you call that '82-'83 directory? I know Rural's telephone directory kind of overlaps.
- 8 A. Can I go back here a second--(interrupted)
- 9 Q. Yes.
- 10 A. (Continuing)--and take some of it back? What we did each year after '78, with the exception of last year, was to use our updated version from the previous year.
- 11 Q. And with Rural's telephone directory?
- 12 A. No. We had no reason to use Rural's telephone directory
- 13 after the first year.
- 14 Q. Okay. Say like in an answer to plaintiff's interrogatories
- 15 to you, you answered that you start with an edited
- 16 version of Rural's telephone directory?
- 17 A. We did.
- 18 Q. And it's broken down into two areas. One is an alphabetical
- 19 listing and two, a numerical listing. Now, are you saying

1 that that just applies for the 1982 or the directory that
 2 is in issue in this lawsuit?

3 A. That applies in 1978 and 1982.

4 MR. KNOBBE: In the interrogatory answer,
 5 we objected to everything other than the two
 6 directories at issue.

7 MR. CAPLINGER: So that just applies to
 8 the last — (interrupted)

9 MR. KNOBBE: That only applies to the
 10 directory in issue.

11 BY MR. CAPLINGER: (continuing)

12 Q. Okay. Why did you go back to using Rural's directory

13 -- if you didn't use it in '79, '80 and '81 and '82, why did
 14 you go back and use it in '83?

15 A. All right, we changed our lead of publication in
 16 northwest Kansas. It was always a November publi-
cation.

17 It would come out simultaneously. In the first year we
 18 used the year old directory. Last year we decided to
make

19 that a December publication. It had nothing to do with
 20 Rural's date, though. The decision was really the
sales manager's decision. It worked out better for her
 21 or with her sales group. I'm not real certain why. You
 22 can ask her later. So, yeah, it made it possible to use
 23 the Rural directory once again. Otherwise, it made no
 24 sense. In previous years, it made no sense to use
 25 Rural's

1 directory when we had our own version, which was as
 2 updated as Rural's

3 Q. There was not benefit in using Rural's?

4 A. There was no benefit. We thought ours was as clean,
 5 maybe cleaner than Rural's. The verifiers were always
 6 instructed not to use the Rural directory in any
 instance.

7 Q. So basically it really wasn't essential to start with or
 8 to use that Rural directory at all in compiling the
 9 information to publish your annual directory, is that
 10 correct?

11 A. Would you repeat that?

12 Q. So are you saying that it really was not and is not
 13 essential to use Rural's directory in compiling the
 14 information to publish your directory?

15 A. It was used originally.

16 Q. Originally?

17 A. And of course everything from that emanates from
the

18 original use.

19 Q. So would it really be essential to you to use it next
 20 year or any year in the future?

21 A. Not directly. We wouldn't have to use Rural's direc-
 22 tory
 23 directly. It's nice to be able to compare it with Rural's
 24 directory to see--you know, after we have compiled
 25 our
 own list, to see how accurate ours is or how inaccurate
 theirs is, whatever.

1 of years--why did you go back and use it this last time?
 2 A. I thought I explained that.
 3 Q. Apparently I missed that.
 4 A. To make it short, in the past our directory--our source
 5 was as up-to-date as Rural's directory. Both of them
 6 were
 7 a year old or whatever closing dates on them. Last
 8 year
 9 we had the advantage, because we moved our direc-
 10 tory back--
 11 we had the advantage of using the Rural directory,
 12 which
 13 there was no advantage to using prior to that.
 14 Q. Apparently I must be slow today or something. I am
 15 really
 16 not getting the answer--I really don't understand
 17 what
 18 you are saying. Why did you use it in 1983--what were
 19 the benefits in starting with the Rural directory
 20 versus
 21 the year before?
 22 A. Well, I would assume that the directory--I did assume
 23 at that time that the directory was more up-to-date
 24 than
 25 the previous year's directory or our previous year's
 26 directory.
 27 Q. Okay. So if I'm understanding your answer now, you
 28 used
 29 it this last year, compared the two and let's say that
 30 you
 31 will not use it again for three or four years, but plan
 32 on using it maybe the fourth or fifth year down the
 33 line?
 34 A. No. That was not why the decision was made last year.
 35 The decision was made, because we had a chance to
use it
 36 where we didn't in the past.

1 A. It's clean.
 2 Q. (Continuing)-- to your Arizona vendor? It's clean.
 3 Nothing marked out, nothing deleted?
 4 A. I won't say there is nothing. We clean it up on a
 5 computer and print it out again. If we make the
 6 corrections on a computer--but there could be some-
 7 thing
 8 at the last minute that is deleted or changed. Rather
 9 than run another print-out out of the computer, we
 10 just
 11 mark it on there. So, yes, there could be a few.
 12 Q. Okay. So like in this situation, your Arizona vendor
 13 would not be guilty of anything, including these--
 14 by including these fictitious listings?
 15 A. As far as I know, they are not.
 16 Q. Okay.
 17 A. Unless they were included by somebody.
 18 Q. Okay. You said earlier that you had some problems
 19 this
 20 last year in compiling the information for your di-
 21 rectory.
 22 Apparently you had more problems this year than
 23 prior
 24 years, is that correct?
 25 A. Correct.
 26 Q. Can you elaborate on that--what caused these prob-
 27 lems?
 28 A. One of them, we were in a big hurry because of the
time
 29 element involved. We only had--since we did use the
directory, we had--didn't have the usual amount of
time.
 30 and our Arizona vendor needed the listings and we did
not

1 have adequate time to devote to looking at --I didn't
 2 spend the time that I usually do on it...
 3 Q. You think that's why you went back this last year and
 used
 4 Rural's telephone directory?
 5 A. I thought that's what we are talking about is last year.
 6 Q. Well, I'm talking about because of this particular set
 of problems this year. Is that why you went back this
 year and-- (interrupted)
 9 A. Are you talking about '83 now?
 10 Q. Right.
 11 A. Oh, I didn't realize that.
 12 MR. KNOBBE: Objection. He has already
 answered the question. That's the deal about which
 one is more current. Go ahead.
 15 Q. Well, as I understood your answer a while ago, why
 you
 16 used Rural's directory is because, you know, it's cur-
 rent.
 17 But I'm talking about--the question goes to the inter-
 nal
 18 problems of the business this last year. You was in a
 19 rush, et cetera. You think that's another reason why
 you
 20 used Rural's directory?
 21 A. No.
 22 Q. Okay. Let's get out of that area. I'm confused. But how
 about is your directory--your Northwest AREA-WIDE
 Directory copyrighted?
 25 A. Yes.

1 and in fact he is advertising in Rural's directory,
 2 which he doesn't necessarily want or need.
 3 Q. Can you give me dates or names?
 4 A. No, I can't. As I said before--but this is a common
 practice.
 6 Q. What other people have told you about this?
 7 A. This is a common practice.
 8 Q. If I were to ask you any particular names, dates, who,
 where--(interrupted)
 10 A. I could not furnish you with them.
 11 Q. Okay. Do you have license agreements with every
 other
 12 telephone company in the area of the Northwest
 AREA-WIDE
 13 Directory?
 14 A. Yes.
 15 Q. How about your other directories?
 16 A. Not all of them. no.
 17 Q. Well, on the basis of your counter-claim, do you feel
 that
 18 they should be required to contract with you?
 19 A. I'm not saying "required" no. No, not necessarily
 required, but they--it looks to me like they are trying
 to monopolize their particular areas. This is by-- most
 22 of them are family owned small towns.
 23 Q. So when you use the word "monopolize" --by them not
 24 entering into a license agreement with you, they're in
 --
 25 that is their attempts with monopolization?

1 A. In their very small areas, most of them--Rural covers
 2 a
 3 large part of our area in northwest Kansas.
 4 Q. Well, earlier you said that it really wasn't essential
 5 to use Rural's telephone directory; therefore, it really
wouldn't be essential to have a license agreement
with
them, would it?
 6 A. It's not essential. Obviously we have existed this long.
 7 Q. Do you have a license agreement with Elkhart Tele-
phone?
 8 A. No.
 9 Q. Okay. You are still trying to get them to enter into a
 10 license agreement?
 11 A. About a year ago, year and a half ago is the last time
 12 we
 13 wrote them a letter.
 14 Q. Would you make available for inspection an income
 15 statement
 16 or balance sheet showing your yellow page revenue
 17 for the
 18 Northwest AREA-WIDE Directory-- (interrupted)
 19 A. Okay.
 20 Q. (Continuing)--for 1978?
 21 MR. KNOBBE: Object to--(interrupted)
 22 A. Okay.
 23 MR. KNOBBE: When--prior to?
 24 MR. CAPLINGER: Well, I believe in your
 25 counter-claim you are asserting that through boycotts,
 disparagements, et cetera that Rural has almost
 captured the high percentage of yellow page adver-
 tisement

1 else--you have no personal knowledge of disparage-
 2 ments
 3 except for what you have been told by some of your
 4 employees? Let me rephrase that. Have you ever had
 5 a
 6 consumer complain directly to you?
 7 A. I'm thinking. I don't recall. I'm not certain I haven't,
 8 though, because I answered many complaints over
 9 the
 10 phone and so forth. At the booth, at the fair, you hear
 11 quite a few. But I don't recall anything specific.
 12 Q. Okay, this is leaving that area. Do you know what
 13 slipping
 14 is?
 15 A. No.
 16 Q. I just heard the term the other day. It's where instead
 17 of using independent verifiers--instead of those
 18 verifiers calling each number, you go ahead and send
 19 something in the mail.
 20 A. I'm aware of that.
 21 Q. Is that what slipping is?
 22 A. Generally. I have never heard the term "slipping," no.
 23 But talking to some of the publishers this last week-
 24 end
 25 in San Antonio, a couple of them who are doing that,
 expect fewer than 50 percent answers on that on the
 cards they send out.
 26 Q. Okay. Just a few more questions. What we went over
 27 earlier, you do admit that there were fictitious listings
inserted in your 1983 directory?

1 A. Yes.
 2 Q. And you admit that these fictitious listings were
 3 included through defendant's mistake or error?

4 A. Right.
 5 MR. CAPLINGER: No more questions.
 6 MR. KNOBBE: Can we state the deposition
 7 is concluded then? I have no questions.

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF KANSAS

RURAL TELEPHONE SERVICE)
COMPANY, INC.,)
) Plaintiff,
v.)
) Civil Action
) No. 83-4086
FEIST PUBLICATIONS, INC.,)
) Defendant,
))

**DEFENDANT'S OPPOSITION TO
 PLAINTIFF'S MOTION FOR SUMMARY
 JUDGMENT AND DEFENDANT'S CROSS MOTION
 FOR SUMMARY JUDGMENT**

Defendant, Feist Publications, Inc., herewith opposes plaintiff's Motion for Summary Judgment and moves the court to grant summary judgment in defendant's favor on the copyright issue.

In support of such opposition, defendant relies on the following grounds:

1. The pleadings, interrogatories, depositions, exhibits and affidavits on file herein show that defendant has not violated plaintiff's alleged copyright, but rather has expended considerable original and independent research, effort and verification in compiling its own directory, the arrangement and scope of which differs from plaintiff's. Professor Nimmer sets forth the law in this regard [*Nimmer on Copyright*, §3.04 (1983)] and his reasoning should be followed by this court.

2. Plaintiff's directory is not a printed work of originality or creativity by an author. It is a mere compilation of factual

material of which plaintiff itself is the only source. As such, defendant must have access to this public information under the Fair Use Doctrine. Fair use herein is a complete defense to plaintiff's action and entitles defendant to summary judgment.

3. Plaintiff comes to this court with unclean hands. Plaintiff, by use of this court and its copyright claim is attempting to illegally extend its monopoly status from providing phone service to the publication of directories in violation of federal antitrust provisions. This is a misuse of its copyright, barring enforcement.

4. Defendant should additionally be allowed to recover from plaintiff that portion of its attorney's fees herein which relate to the copyright issue. 17 U.S.C. §505.

Defendant's memorandum in support of this Opposition and Cross Motion is enclosed as part of this Opposition and Cross Motion.

Defendant respectfully requests this court to deny plaintiff's motion, grant defendant judgment on the copyright issue, and determine the attorney's fee question.

Defendant also respectfully requests oral argument before this court.

[Jurat and Certificates of Service omitted in printing]

**DEFENDANT'S MEMORANDUM IN SUPPORT OF
OPPOSITION TO PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND IN SUPPORT OF
DEFENDANT'S CROSS MOTION FOR
SUMMARY JUDGMENT**

I. UNCONTROVERTED FACTS.

Defendant Feist does not controvert the factual statement set forth by plaintiff. A few clarifications are necessary

to prevent the statement from being misleading, but they do not raise a genuine issue of fact herein. For example,

1. Paragraph 6 of plaintiff's statement of uncontested facts implies that many ("a number of") telephone companies do not license listings to Feist. The deposition reference cited [Dep. Tom Feist, p. 39, 40] indicates that for Feist's Northwest Kansas AREA-WIDE Directory at issue herein, plaintiff is the only phone company that does not license with Feist. In the three other areas Feist serves, twenty-three phone companies license with Feist and five do not.

2. Paragraph 10 of plaintiff's Statement of Facts implies that plaintiff's directory was not used by Feist as a source of listing information for 1979-1982. Plaintiff's directory was used as a source of listing information in those years. It simply was not as good a source as in 1978 or 1982 since it was not as current as Feist would have preferred. [Dep. Tom Feist, pp. 16, 19, 21-23].

3. Paragraph 12 of plaintiff's Statement of Facts is correct as stated therein. However, plaintiff's later argument that because of the time element Feist lacked the time to independently obtain listings (Plaintiff's Memo, p. 9) is not a correct statement of fact.

4. Paragraph 14 of plaintiff's Statement of Facts is misleading in that it implies that plaintiff first inserted only four fictitious listings in its 1982-1983 directory and "the four fictitious listings" then appeared in Feist's directory. In fact, plaintiff inserted twenty-eight fictitious listings in its directory. (Attachment 4, plaintiff's Answers to Interrogatories.) In prior years, plaintiff's directories contained only ten to twelve fictitious listings. [Exhibit (FF).] The twenty-eight fictitious listings were first inserted in plaintiff's 1980-1981 directory published in the fall of 1980. [Affidavit of Tom Feist, #11; Exhibit (HH).] Prior to this, plaintiff had forced one competitor out of business [Exhibit (EE)] and had threatened Feist with litigation also [Exhibit (GG)].

In addition to plaintiff's statement of uncontested facts, the following facts are also uncontested:

5. To compile the portion of Feist's directory containing listings from plaintiff's exchange areas, an edited version of a portion of plaintiff's interlocking (alphabetical) directory [Exhibit (C)] is computer keyed to obtain an alphabetical print out [Exhibit (D)] of each town Feist will include in its directory. Pre-verification updating is written on this print out to add mailing addresses obtained by Feist from post office mail verifications of subscribers [Exhibit (E)] these cards are individually addressed and mailed to subscribers and the Post Office, pursuant to regulation, completes the address or verifies non-existence] written requests by subscribers for particular listings or corrections [Exhibit (F)], and other known changes, additions, or deletions. [Affidavit, Tom Feist, paragraph 6].

6. These corrections and updating changes are computer keyed to combine these sources and computer sort the material into two initially edited print outs. One which interlocks alphabetically all listings regardless of town [Exhibit (G)] is sent to a computer service vendor in Arizona for merger into the rest of the Feist directory, which covers a much wider area than only plaintiff's listings [Affidavit, Tom Feist, paragraph 7].

7. A second print out [Exhibit (H)] compiled by town in numerical sequence according to phone numbers is sent to independent verifiers in their respective towns to research for changes, additions, and deletions. The phone order sequence of this second print out facilitates finding new listings [Dep. Tom Feist, p. 19]. These independent verifiers phone every telephone number on the print out for their town to verify name, address, and number as well as all missing numbers in the numerical sequence to search for new listings. [Dep. Marilyn Johnson, p. 7; Affidavit, Tom Feist, paragraph 8.]

8. Pre-verification changes and updating are keyed into Feist's computer and as the independent verifier's research is returned to Feist, these changes, additions, and deletions are added. Questionable or incomplete listings are verified in-house by phone from Feist's office when necessary [Exhibit (I); Affidavit, Tom Feist, paragraph 9].

9. When the directory proof is received from Feist's Arizona computer service vendor, it is proofread for errors, all data compiled from verifiers' research is added and the corrected proof is returned to the Arizona computer service vendor. A final repro (paste up pages) [Exhibit (M)] of the directory is finally proofed and updated and sent to a printer for printing of the directory. [Affidavit, Tom Feist, paragraph 10.]

10. Plaintiff placed twenty-eight fictitious listings [Plaintiff's Answers to Interrogatories #12, Attachment 4], in its 1980-1981 directory [Exhibit (HH)], its 1981-1982 directory [Exhibit (II)], and its 1982-1983 directory [Exhibit 2]. None of them appeared in the earlier Feist 1980, 1981, or 1982 Northwest Kansas AREA-WIDE Telephone Directories. Four of the twenty-eight fictitious listings appeared in Feist's 1983 Northwest Kansas AREA-WIDE Telephone Directory [Exhibit 3; Affidavit, Tom Feist, paragraph 11].

11. The four fictitious listings which appeared in Feist's 1983 Northwest Kansas AREA-WIDE Telephone Directory were originally all removed either by initial editing or by independent verifiers from each town. Feist has been unable to ascertain precisely how they reappeared in its final directory. Any error was unintentional on Feist's part. Either Feist missed keying the independent verifier correction or the listing was called in to Feist and then reincorporated after being initially removed [Dep. Tom Feist, pp. 29, 49; Affidavit, Tom Feist, paragraph 12].

12. Since one of Feist's sources of information is plaintiff's white page listings, it is possible for Feist to include fictitious

listings placed by plaintiff in its directory. However, since Feist also utilizes other sources and numerous verification procedures the misleading listings should not have appeared. [Affidavit, Tom Feist, paragraph 13].

13. Feist obtains white page listings for all exchanges in its 1983 Northwest Kansas AREA-WIDE Telephone Directory other than those from plaintiff's exchanges, by licensing listing information in updated form from the telephone company serving that exchange. [Dep. Tom Feist, p.39; Exhibits (SS), (TT), (UU), and (VV).] Plaintiff refuses to license with Feist. [Plaintiff's Answer to Counterclaim, paragraph 6.]

14. After the complaint was filed herein, Feist compiled a comparison of its 1983 Northwest Kansas AREA-WIDE Telephone Directory [Exhibit 3] and plaintiff's 1982-1983 directory [Exhibit 2]. Feist compared listings from those exchanges of plaintiff's which Feist's directory covers as they appear, if at all, in plaintiff's directory and, if at all, in Feist's directory. [Exhibit (P); Affidavit Tom Feist, paragraph 15.]

15. Feist's 1983 Northwest Kansas AREA-WIDE Telephone Directory contains 46,878 white page listings [Exhibit 3]. Plaintiff's 1982-1983 telephone directory [Exhibit 2] contains approximately 7,700 listings, 4,935 of which are from exchanges which are included in Feist's directory [Exhibit (P); Affidavit Tom Feist, paragraph 16].

16. Of the 4,935 listings which could be duplicated by copying, 3,626 differ. There are 164 new listings contained in Feist's directory which are not in plaintiff's. Other differences include deleted outdated listings, spelling or other obvious error differences, mailing address changes or additions, style, format, and other differences [Exhibit (P); Affidavit Tom Feist, paragraph 17].

17. Without access to the plaintiff's directory as a source of white page listing information, Feist could not economically

compile an independent AREA-WIDE directory. [Dep. Tom Feist, pp. 42-43; Affidavit Tom Feist, paragraph 18.]

18. Feist first requested a license agreement from plaintiff in April 1978. [Plaintiff's Answers to Interrogatories, Attachment 1.] He explained that he wanted to establish an AREA-WIDE phone directory for Northwest Kansas similar to the one he was publishing in Southwest Kansas, and he furnished plaintiff's directors with copies of his 1978 Southwest Kansas AREA-WIDE Directory [Exhibit (BB)]. At this time, plaintiff published a 6 inch x 9 inch telephone directory containing only phone listings from its own exchanges [Exhibit (AA)].

19. Plaintiff refused to license listings to Feist. Plaintiff has provided its listings to civic organizations and provides them to General Telephone of Nebraska [Dep. H.J. Austerman, pp. 66-67].

20. Plaintiff's next published directory was a 9 inch x 11 inch one containing a second set of white page listings for exchanges other than plaintiff's [Exhibit (DD)].

21. Plaintiff threatened to sue Feist for copyright infringement in March 1980, complaining, among other other things that Feist had violated plaintiff's copyright by including in the Feist Directory an unlisted number from plaintiff's exchange. Feist, through counsel, replied requesting additional facts and reiterating its license request. [Exhibit (GG).] Nothing happened.

22. Plaintiff inserted an expanded number of fictitious listings in its 1980-1981 Directory [Exhibit (HH); Plaintiff's Answer to Interrogatories, Attachment 4].

23. Prior to filing this suit, plaintiff discussed its yellow page sales revenue with its directory publishing agent and reviewed its sales dollar volume since 1978. [Exhibit (JJ).]

24. When plaintiff made changes in the fictitious listings it inserted in its 1983-1984 directory, there was written correspondence concerning the change [Exhibit (KK)]. Although requested, no correspondence concerning the change of fictitious listings in plaintiff's 1980-1981 directory has been produced.

25. Plaintiff's yellow page advertising revenue from towns in its phone exchange area totals at least \$38,256 [Exhibit (NN) left column]. Feist's yellow page revenue from those same towns totals \$8,517 [Exhibit (QQ)].

[Legal Argument and Authorities and Jurat and Certificate of Service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RURAL TELEPHONE SERVICE)
COMPANY, INC.,)
Plaintiff)
vs.) Civil Action
FEIST PUBLICATIONS, INC.,) No. 83-4086
Defendant.)

**PLAINTIFF'S REPLY TO DEFENDANT'S
MEMORANDUM IN SUPPORT OF OPPOSITION
TO PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND PLAINTIFF'S RESPONSE
TO DEFENDANT'S CROSS-MOTION
FOR SUMMARY JUDGMENT**

This memorandum is submitted to both reply to defendant's response to plaintiff's motion for summary judgment of copyright infringement, and to respond to defendant's cross-motion for summary judgment.

Plaintiff, Rural Telephone Service Company, Inc. (Rural) does not controvert the factual statements set forth by the defendant. Rural, however, would like to make one clarification which it feels necessary to prevent the statement from being misleading, but stipulates that it does not raise a genuine issue of material fact herein.

1. The last sentence in paragraph 4 of defendant's Uncontroverted Facts reads..."prior to this, plaintiff had forced one competitor out of business...". The directory company defendant is referring to is Uniprint, Inc. of Loveland, Colorado. In September 1978, after several Rural telephone subscriber complaints about Uniprint's directory, counsel for

Rural sent a letter to the President of Uniprint alleging possible copyright infringement and requesting a response. (Letter attached, Ex. I.) The President of Uniprint, Inc. responded by letter dated October 23, 1978, stating that litigation for copyright infringement and injunctive relief would be unnecessary since Uniprint was out of the directory business, and in fact had closed its offices in May of 1978. (Letter attached, Ex. II.) This was the only correspondence between the two companies. From this correspondence and respective dates, it can readily be seen that Rural had no part to play in Uniprint leaving the directory business.

Since no genuine issues of material fact exist, only legal determinations are left to be made. Rural continues to rely on the legal arguments set forth in its Memorandum in Support of Plaintiff's Motion for Summary Judgment and will only address those issues raised by defendant in its opposition and cross-motion.

[Legal Argument and Authorities and Jurat and Certificate of Service omitted in printing]

[Transcript p. 17]

CROSS EXAMINATION OF TOM FEIST
PRESIDENT OF FEIST PUBLICATIONS, INC.
BY JAMES M. CAPLINGER, JR.

- 1 Q. (Mr. Caplinger) Prior to 1977 when you went into business, had you been
- 2 in the telephone publishing company?
- 3 A. (Mr. Feist) No.
- 4 Q. Or business? What kind of business had you been in?
- 5 A. I was a school teacher and farmer.
- 6 Q. And when you went into business in 1977, what was the
- 7 purpose of the business?
- 8 A. It looked like a good idea, looked like we could
- 9 provide a decent service, good service. Within the
- 10 five towns within 20 miles of Spearville, had five
- 11 different directories, including a county seat had a
- 12 different directory than we had, so it looked like an
- 13 excellent idea.
- 14 Q. Was it the corporation's business purpose to strictly
- 15 publish telephone directories, or were you planning on
- 16 publishing other publications?
- 17 A. We had no plans to publish other, anything else, but we
- 18 have, we have done other things.

[Transcript p. 19]

- 7 Q. (Mr. Caplinger) I am trying to find out for the court
- 8 what you did when you went into business to make sure
- 9 that you were going to properly follow the Federal
- 10 Copyright Act?
- 11 A. Before we went into business, and incidentally, we did
- 12 purchase this from another person who had the idea, and
- 13 just started selling it, but we looked at two of his
- 14 books he had published in Oklahoma, McCallister and

15 Stillwater directories. It is obvious to us that he
16 violated Southwestern Bell's copyright. We were
17 certain we didn't want to do that. So that is when I
18 contacted Mr. Knobbe, and he said you must do it
19 through independent research. I assume what we did
was
20 through independent research.

[Transcript p. 20]

21 Q. In 1978 did you approach Rural Telephone, and re-
quest
22 to buy the information from them?

23 A. Yes, I did.

24 Q. Why did you do that?

25 A. I approached all the companies, all the telephone

[Transcript p. 21]

1 companies in northwest Kansas as we do in every
area.

2 Q. Did you feel that that was necessary?

3 A. Certainly, I knew we needed a license agreement.

4 Q. Is it your testimony today that you needed a license
5 agreement or you could go out and use somebody
else's

6 telephone directory without your permission, as long
as

7 you verified the information?

8 A. I don't understand the question.

9 Q. I am trying to find out what your intent was in 1977,
10 when you established the first northwest Kansas
11 area-wide directory. Did you feel that you needed a
12 license agreement?

13 A. Obviously we wouldn't have attended board meetings
and

14 so forth, and interviewed managers if we didn't think
15 it was necessary.

16 Q. And did Rural Telephone decline to sell you that
17 information?

18 A. Yes.

19 Q. And then what did you do?

20 A. We began independent research the best we could
through
21 many different sources.

22 THE COURT: Did you buy all the other di-
rectories?

23 Did all the other companies join with you?

24 THE WITNESS: Yes.

25 THE COURT: And you bought, you got a
license from

[Transcript p. 22]

1 them?

2 THE WITNESS: Right, we have those license
3 agreements here I believe.

4 Q. (Mr. Caplinger) Isn't it a fact that that is so
5 northwest Kansas — but Feist also publishes three
6 other directories in Kansas?

7 A. Presently — at that time three other, yes.

8 Q. I see. At that time, in the other areas in Kansas
9 where you would have published your directory there
10 were other telephone companies that declined to sell
11 you their information, correct?

12 A. Yes.

13 Q. And so when Rural Telephone, one of those individuals
14 or companies that declined, what did you do then to
15 put your directory together?

16 A. We obtained our listings as we did in rural areas,
17 through independent research.

18 Q. In other words, you took the companies, went in took
19 the companies' telephone directory, took the white
page

20 listing that you needed for your directory, and then
21 attempted to verify that information?

22 A. Yes.

23 Q. Did you feel at that time that that was in accordance
24 with the Federal Copyright Act?

25 A. Yes.

[Transcript p. 23]

- 1 Q. Did your attorney tell you that?
2 A. I don't remember specifically asking him. He said you
3 must get it through independent research.
4 Q. Did he ever explain what independent research meant
5 such as going out, and doing your own independent
6 canvass?
21 Q. (Mr. Caplinger) Not asking what the attorney told
you,
22 I am asking in your opinion back in 1978 when you
first
23 were compiling information to put together your first
24 northwest area-wide directory. So your testimony is
25 that you felt that you did not need to do your own

[Transcript p. 24]

- 1 independent canvass?
2 A. We did not need? It was — I knew we needed to do
3 independent research, that is what we did. It was my
4 opinion that we did hundreds of hours of independent
5 research compiling these listings, maybe thousands
of
6 hours just for Rural alone, just for 49 hundred
7 listings.
8 Q. Can you explain what you mean by independent
research?
9 A. We used different methods, as we have said before, we
10 did use Rural's directory, edited version of Rural's
directory, and used the post office and other sources.
12 Q. So in other words you are testifying when you say you
13 used independent resources, that would have been all
14 after the fact of taking the white page listings that
15 you needed to publish your northwest Kansas area-
wide
16 directory out of Rural's telephone directory, correct?
17 MR. KNOBBE: Objection, I am not sure I even
18 understand the question.
19 Q. Trying to find out, when you say you were using
20 independent resources, et cetera, did you start with

[Transcript p. 25]

- 21 Rural's telephone directory?
22 A. Yes.
23 Q. And then what did you do?
24 A. The directory was edited, all of the listings that, for
example, foreign listings and bold listings, so forth,

1 we took out, then they had to be placed in that —
2 Rural does what we call an interlocking directory. All
3 the listings are alphabetized in one group, not by
4 towns, so we had to list them by towns. Manually.
5 re-alphabetize them in other words, so our verifiers in
6 each town could call them. That is what it was in '78.
7 It changed by '82.

- 8 Q. Okay. Can you tell this court why Feist Publications
9 did not perform its own independent canvass before
10 using Rural's telephone directory?
11 A. If you can give me a viable way that I could compete
12 against Rural, and still obtain those listings by going
13 door to door, I would like to hear it. I am a personal
14 friend to at least, or I know at least two hundred
15 publishers in this country that publish Yellow Pages
16 and they would love to hear how that could be done.
17 None of them have ever come up with any ideas on
how it
18 can be done.
19 Q. Mr. Feist, did anybody require you to publish a
20 northwest Kansas area-wide directory including Rural
21 Telephone Company service area?
22 A. No.
23 Q. So it is strictly for profit?
24 A. It wasn't strictly for profit, no.
25 Q. You were including Rural Telephone's white page

[Transcript p. 26]

- 1 listings in your directory to enhance the selling of
2 Yellow Page advertising, and that was to make a
profit
3 for Feist Publications?

4 A. Not to make a profit. As I explained in my deposition.
5 we had to go to other areas, and they required about
6 three to four months canvass in each area. In order
7 to keep the same man busy year round we needed
another
8 area in northwest Kansas. And we lost money the first
9 two or three years on it. Eventually it did, shows a
10 profit some years, some years it doesn't.
11 Q. And a lot of businesses are that way the first couple
12 of years.
13 A. Sure.
14 Q. You were present when I gave my opening statement?
15 A. Yes.
16 Q. And do you recall when I read what test the courts,
17 Federal courts have used in the area of what a
18 publishing company needs to do in compiling its own
19 directory?
20 A. Yes, I am familiar with it now.
21 Q. And where that test says that you need to first make
an
22 independent canvass. Are you telling this court here
23 today that that is impossible?
24 A. Yes.
25 Q. Physically impossible to do that?

[Transcript p. 27]

1 A. It would take probably 10 years to do it approxi-
mately,
2 and of course you can't — you can't produce a
3 telephone directory like that. Covering 16 thousand
4 miles, 16 thousand square miles with 50 thousand
5 listings, you have to be — I presume you couldn't even
6 use the telephone directory to call a farmer 15 miles
7 away to make an appointment with him to go see what
his
8 listing is. That is how ridiculous it is. You would
9 have to go out there first. If he is not home, you go
out there the next day. You are talking about doing

11 that in an area of 16 thousand square miles which as
I
12 said is impossible. Economically not feasible.
13 Q. There is a difference in being possible and not
possible. You are saying it is possible —
14 A. Not possible to produce a directory that way. If it
15 takes ten years, coming out with a directory every ten
16 years —
17 Q. It is feasibly possible, but economically —
18 A. No, I am saying it can't be done, a directory can't be
19 done every ten years.
20 Q. In the course of this litigation, you would have
21 prepared and submitted an affidavit. Is this your
22 affidavit?
23 A. Yes.
24 Q. And —

[Transcript p. 28]

1 MR. KNOBBE: Can I see the affidavit?
2 THE COURT: Yes.
3 Q. (Mr. Caplinger) Is it a fact under paragraph 18 in
4 your affidavit that you state basically that you could
5 not compile the information economically?
6 A. True.
7 Q. So, in essence it really comes down to —
8 A. — support my statement.
9 Q. What I am trying to find out, is it your testimony that
10 you can't physically do it, or can't economically do
it?
11 A. Both are true. Certainly couldn't make any money on
a
12 ten-year directory.
13 Q. Did you have to put Rural's Telephone's white page
listing in your northwest —
14 A. Yes.
15 Q. Why?
16 A. Look at the map. [Referring to Exhibit K-1]
17 Q. I am looking at the map.

20 A. It would not be a contiguous directory representing
one
21 large trade area. That is the idea behind the combined
22 or merged directories, that you have one large trade
23 area. That thing would cut holes in it, would make it
24 impossible.
25 Q. In other words it is your opinion, your decision that

[Transcript p. 29]

1 you had to include that?
2 A. Anybody that looked at the map I think would come to
3 the same conclusion.
4 Q. Please be responsive. It was your decision?
5 A. Yes.
6 Q. Did the Kansas Corporation Commission or any other
7 state agency require you to include that?
8 A. No.
9 Q. It was your decision?
10 A. Yes.
11 Q. Did you in fact not make a profit off your 1983
12 directory by including Rural? When I say that, Rural
13 Telephone service area, and those white page listings.
14 A. I believe we made a profit in '83.
15 Q. In 1980 did anybody from Rural Telephone Service
16 Company notify you that they questioned the way you
are
17 putting together your northwest Kansas area-wide
directory?
18 A. I don't know what year it was. We received a letter
19 either from you or your father.
20 Q. And that was before my time as a lawyer, so it would
21 have been my father. And basically were they placing
22 you on notice that they felt you were infringing their
23 copyright?
24 A. I didn't feel like I was being placed on notice, no.

[Transcript p. 30]

1 Q. Hand you what has been marked Plaintiff's Exhibit 4,
2 and is that the letter that you would have received on

3 March 20, 1980 from the attorney for Rural Tele-
phone
4 Service Company?
5 A. Yes.
6 Q. And can you read the first paragraph into the record?
15 A. This office represents Rural Telephone Service
Company
16 in Lenora, Kansas. Because of many complaints, an
17 evaluation of your northwest Kansas area-wide tele-
phone
18 directory has been made and your infringement of the
19 Rural Telephone copyrighted telephone directory is
20 quite clear."
21 May I make a statement now?
22 THE COURT: Sure, you can go ahead and
explain
23 what you want to —
24 Q. Go ahead.
25 A. Well, the fact there were many complaints, and I

[Transcript p. 31]

1 presume this is correct, shows that you can't do a very
2 good job through independent research without using
3 telephone company listings. Also they note in here
4 that, I believe it was this letter, that we put an
5 unlisted number in. At the same time accused us of
6 not
7 doing independent research. Somebody tell me how
we
7 got the unlisted number?
8 Q. Excuse me. When you say used independent research,
9 isn't it a fact that prior to this letter you used
10 point blank Rural Telephone's directory, and the
11 information that you would have included in your
12 northwest came from that directory, is that a fact?
13 A. It started from that. It — there was no resemblance.
14 We added many, many things that you didn't have in
your

15 directory, caught several hundred mistakes you made
16 in
17 your directory, for example. I am sure you heard from
subscribers too.

18 Q. So it is your testimony now you didn't even need Rural
19 Telephone directory?

20 A. We had to start with it. We admitted that.

[Transcript p. 34]

2 Q. Were you of the opinion that Rural Telephone was
3 including fictitious listings to protect their
4 copyright?

5 A. Yes.

6 Q. Is it a fact in '83 your northwest area-wide directory
7 came out in final form was published, it included a
8 number of these fictitious listings that were included
9 in Rural's '82 record?

10 A. Yes.

11 Q. It is your testimony you don't know how that happened?

12 A. Correct, I don't know how.

13 Q. It is a fact that Rural Telephone then brought
14 litigation claiming copyright infringement in 1983
15 against your company, correct?

16 A. Yes.

[Transcript p. 35]

18 Q. After receiving this notice of March 20, 1980, from the
19 attorney for Rural Telephone, did you ever sit down
20 with Rural Telephone, representative of Rural
21 Telephone, and inform them that you felt that the
22 process that you were using complied with the Federal
23 Copyright Act?

24 A. I didn't. I am not certain if any attorney didn't
25 write a letter. I think he probably did.

[Transcript p. 36]

20 Q. Do you recall your deposition?

21 A. Yes..

22 Q. Taken by me back in 1983, and do you recall that in
23 part the reason that you would have again used Rural
24 Telephone's directory in 1983 would have been because
25 Feist was in a hurry that year?

[Transcript p. 37]

1 A. I just explained that. We moved our publishing date
2 back two or three months, which meant we had to wait
3 until Rural's book came out before we could do
4 anything, before we could start anything, which put
5 us in somewhat of a bind?

6 Q. Because —

7 A. We were changing other procedures too. We were
going

8 on computer at that time, which we hadn't before.

9 Q. And I take it that your testimony, because of a change
10 in the date of your publication you again used Rural
11 Telephone's directory?

12 A. More so than previously, yes.

[Transcript p. 38]

22 Q. Did Feist plan on ever conducting its own independent
23 canvass?

24 A. It is not practical. Or viable.

25 Q. And do you have an opinion on how much it would cost
to

[Transcript p. 39]

1 conduct such an independent canvass?

2 A. Cost and time would be prohibitive.

3 Q. Do you have an opinion of how much it would cost?

4 A. No. Just common sense.

5 Q. That do you have an opinion whether it would cost
more

6 to do an independent canvass versus using Rural's
7 telephone directory and later verifying that
8 information?

- 13 A. Ask it again, please.
14 Q. Try to find out would an independent canvass cost
more
15 in your opinion than simply taking the information
from
16 Rural's telephone directory and verifying it?
17 A. Independent canvass, the way it is described here as
not using Rural's book as a base, can't be done.

[Transcript p. 42]

[Examination of Tom Feist by Kyler Knobbe]

- 22 Q. (Mr. Knobbe) Now, I direct your attention to what's
been marked
23 Exhibit K-1, which is a map. Can you identify that?
24 A. (Mr. Feist) The map itself is what we call a utility
map. The
25 source of this map was obtained from the KCC,
Kansas

[Transcript p. 43]

- 1 Corporation Commission. We enhanced it somewhat,
but
2 the screens and the color to show the various telephone
3 directories, and exchange areas in northwest Kansas,
15
4 counties.
5 Q. So each color on that represents a different directory?
6 A. Correct.
7 Q. What is the Feist area-wide directory concept? Would
8 you explain that?
9 A. The concept is to put all of the telephone directories
10 in one trade area, geographic trade area into one book.
11 Q. Okay. For example, the yellow area on there, what
does
12 that represent on Exhibit K-1?
13 A. The yellow is Rural Telephone Company service area.
14 Q. Hand you Exhibit AA.

[Transcript p. 44]

- 2 Q. (Mr. Knobbe) Identify Exhibit AA.
3 A. That it is Rural directory of I believe 1977-'78.
4 Q. All right.
5 A. That is the directory they had.
6 Q. What is contained in that, in Exhibit AA?
7 A. Rural listings only.
8 Q. I take it you mean --
9 A. Interlocking form, not by towns in other words.
10 Q. Mr. Feist, hand you what has been marked Exhibit
BB,
11 can you identify that?
12 A. This is our 19— our original directory for southwest
13 Kansas 1978. It was published in March of 1978.

[Transcript p. 46]

- 5 Q. (Mr. Knobbe) I am handing you what have been
marked
6 Exhibits SS, TT, UU, and VV. Can you identify those?
7 A. These are license agreements that we had with tele-
phone
8 companies.
9 Q. Those are the ones that are —
10 A. Northwest Kansas, yes.
11 Q. They were the ones that were in effect when the
alleged
12 infringing directory came out?
13 A. Yes.
14 Q. And now I am handing you L-1, M-1, N-1, and O-1.
Can
15 you identify those?
16 A. These apparently are the latest.
17 Q. The ones currently in effect?
18 A. Yes.
19 Q. You still license with all the companies in northwest
20 Kansas with the exception of Rural?
21 A. Yes.
22 Q. You did not obtain a license from Rural?
23 A. No.

24 Q. Did you show them that directory that is put out in
25 southwest Kansas?

[Transcript p. 47]

1 A. Yes, we did.

2 Q. I am handing you what has been marked Exhibit DD.
Can
3 you identify that?

4 A. That's Rural's, a Rural directory dated '78-'79.

5 Q. Did that come out after or before you appeared before
6 the board?

7 A. About six months after I appeared before the board.

8 Q. And is it in any way different from the earlier
9 directory?

10 A. Obviously it is different. This looks like a 6 by 9
11 directory which is standard. This is a 9 by 11
12 directory, a larger, larger formality, and trim size,
13 and there are listings in there for other towns besides
14 the Rural service area.

[Transcript p. 48]

12 THE COURT: I am asking him if in Rural's
13 1978-'79

14 directory which includes Rural area, plus other areas,
15 other towns not in their other areas, not in their
area, did they have licenses with the other areas?

16 MR. KNOBBE: You can't testify to that. That
is

17 in the opinion, not within your knowledge.

18 THE WITNESS: I know the answer.

19 MR. KNOBBE: Go ahead then if that is the
answer.

20 THE WITNESS: It is no, they didn't have a
21 license.

[Transcript p. 49]

3 Q. (Mr. Knobbe) Okay. Mr. Feist, let's move over to how
4 your verification process works. What we have, Your
5 Honor, are generally business records, summary of

6 business records. We will try to move through them
7 fairly promptly for you.

8 Would it be more helpful for you to step down?
9 Would you like me to give you a summary of what is
10 laying on the table which is going to be of more
11 benefit to your testimony?

12 A. There are many steps.

13 THE COURT: Do you have another copy of
that for
14 the court?

15 MR. KNOBBE: Yes, Your Honor.

16 A. May I approach the exhibits?

17 THE COURT: Sure, go right ahead.

18 A. In Exhibit C, this is the, a Rural directory, edited
19 version of the Rural directory. As you can see it is
20 marked up. There are, maybe you can't see, but there
21 are marks on at least half the listings or more.

[Transcript p. 50]

11 Q. (Mr. Knobbe) Okay, go ahead, move on to Exhibit D.
12 A. Okay. This is an alphabetical list of our base, the
13 directory we used the year before. The computer had
to

14 alphabetize it by town in order for us to do some
15 editing on it, updating it from notes that we had.

16 Q. These are Exhibit E.

17 A. These are cards we sent to post offices. We had to
18 send a card for every listing, and pay I think 13 cents
19 to the post office at that time. That is what a post
20 card costs, and to update listings in that way. We
21 found Rural does not put addresses in their directory,
22 except for Victoria, the town of Victoria. And we
23 added addresses for everyone in the directory.

24 Exhibit F are letters and notes that we received
25 in our office, phone calls and so forth, people calling

[Transcript p. 51]

1 us and telling us that we made a mistake or left their
2 listing out. And incidentally when we did verify if we

3 cannot get a hold of someone, if our verifiers can't,
4 we call repeatedly sometimes 15, 20 times over a
5 period
6 of three weeks. If we cannot contact them, we leave
7 them out of the directory. Eventually these people
8 called us or write us, say you left us out of the
9 directory, it is not complete. That is what this pile
is.

10 G is a preparation — well, I am not certain
what
11 G is.

12 Q. Identified as a computer printout interlocking?

13 A. It is supposed to be phone order directory that we send
14 to the verifiers. In other words, we — our computer
15 lists these —

16 Q. Excuse me, isn't G — this says we sent that to Data
17 Graphics for key. Are you down the line? H is the
18 verifiers?

19 A. Okay, that went through our computer vendor in
Phoenix,
20 Arizona. When it comes back to us, it is in phone
21 order sequence which means the smallest number
first

22 going down to the largest. We do this for two
23 different reasons. One, to keep our verifiers honest,
24 so they won't use the Rural directory to compare, side
25 by side comparing. They can't do it. It is in phone

[Transcript p. 52]

1 order sequence. To find a name you have got to go
2 through the whole list. The other reason we do it is
3 so that they can see the gaps between numbers.
Maybe
4 there is three sets of digits that are missing, and so
5 they can call those three, and attempt to find new
6 numbers. We paid them extra for any new numbers
that
7 they found.

8 Exhibit H are the verifiers' listings returned to

9 us with all their markings. Thousands and thousands
of
10 markings went on to this.

11 That then, well Exhibit I, these are — this is
12 the cleanup I was telling you about that our in-house
13 verifiers do. The people that cannot be contacted
14 originally by the verifiers in Rural's area, we
15 continued to try to contact them, and this is what this
16 is. We do calling between numbers, and that is
17 represented in here too. This is strictly in-house
18 stuff.

19 J, the in-house work we had done is then
placed on
20 another computer sheet.

21 We also had white bold listings which I guess
if
22 anything was totally obtained through independent
23 research, these would be. These people were called on
24 by our salesmen when they canvassed northwest
25 Kansas,
they also were added to the white pages.

[Transcript p. 53]

1 Then we have the repro Data Graphics, our
2 vendor
3 puts it in pagination form. We go through that one
more time, and proof it manually.

4 These last two are N. This is done in repro form
5 so that we can proof what was sent to us. I am sorry.
6 We can proof what — this is put in — in interlocking
7 form so we can proof the verifiers' listings, and then
8 finally it is put, the directory proof is put in
9 alphabetical form so we can compare this with the
10 repor
and proof.

11 Then P is a ledger book, side by side listings
12 showing our listings and Rural's, and anything that
has
13 a, that is color coded, color marked is a change. You

14 can see most of them have been changed. We found
15 200
16 some mistakes that Rural made in their listing,
17 misspelling of names, and in fact some numbers that
18 were even incorrect. As you can see most of the
listings, if I may approach the bench —

19 THE COURT: Yes.

20 A. Most of the listings had been changed, addresses, or
21 whatever.

22 Q. Let's run that by again. On the lefthand side, what
23 did you do? You compiled a composite here is what
24 Rural's listings show?

25 A. Yes, up here.

[Transcript p. 54]

1 Q. And here is how the listing appears in the Feist book?
2 A. Right. Here is how our listings appear, and theirs.
3 There is very little — very fe^l listings that are
4 identical.

5 THE COURT: Okay.

6 Q. When you prepared Exhibit P, did you make a com-
putation
7 of how many potentially duplicate listings there
were,
8 same listing appearing in your directory and Rural
9 directory, rough numbers?

10 A. We did. I don't recall.

11 Q. Okay. Do you have an idea of the percentage that are
12 different?

13 A. Percentage? It's got to be 80 percent or higher.

14 Q. When you went through this verification process, did
you
15 think you were violating the telephone company's
16 copyright by using —

17 A. Of course not.

18 Q. You have testified you cannot compile a directory by
an
19 independent survey. Could you do a house to house
20 survey if you went and called on those people?

21 A. Once again I don't see how it is possible.

[Transcript p. 56]

12 Q. (Mr. Knobbe) These are the fictitious listings
13 inserted in Rural book, Exhibit 1. How many are on
14 that page?

15 A. You want me to count them?

16 Q. 28.

17 A. 28.

18 Q. All right. Of those 28, how many did you, were
19 included in the Feist northwest Kansas area-wide,
20 Exhibit 2?

21 A. Four. Can I make a further statement on that?

22 Q. Sure.

23 A. There were more than 28 fictitious listings, there
were
24 almost twice that many.

25 Q. That you took out?

[Transcript p. 57]

1 A. About 56 I think would be more accurate.

[Transcript p. 62]

23 Q. Does Rural still refuse to license?

24 A. Yes.

25 Q. Mr. Feist, I am handing you what has been marked

t
2:

[Transcript p. 63]

1 Exhibit P-1, can you identify that?

2 A. That's Kansas Central Regional Telephone Directory.

3 Q. Okay. What telephone companies put that telephone
4 directory out?

5 A. Wilson H and B Telephone Company.

6 Q. Would you turn to page 17 of that directory. There is
7 a clip on it.

8 A. Okay. Directory listings, license agreement, they have
9 a list of their license agreements on that page.

10 Q. Now, that page tells you what the different listings
11 that are in this directory that come from other phone

12 companies?

13 A. Correct.

14 Q. Would you read the third — is it the third? I am
15 sorry.

16 A. Third one, yes.

17 Q. Read the third paragraph down.

18 A. "The Olmitz listings contained herein are
19 transcribed by Gronseth Directory Service
20 Corporation, from compilations copyrighted 1986 by
Rural
21 Telephone Service Company, Inc., and may not be
22 reproduced in whole or in part, or in any form
23 whatsoever without the consent of Rural Telephone
24 Service Company Inc."

25 Q. What does that tell you?

[Transcript p. 64]

1 A. It tells me they are licensing with another company in
2 an area that does not compete against them.

5 Q. A couple of things that we need to clear up. In your
6 direct cross or whatever the initial examination by
7 Mr. Caplinger, we went through that other companies
8 declined to license with you. How many companies
don't

9 license with you, Tom — Mr. Feist?

10 A. Probably half a dozen small, very small companies.
11 These two for example.

12 Q. Those two?

13 A. Because they decided to come out with their own
14 area-wide, so they apparently for that reason refuse
to
15 license.

16 Q. Did any of those companies that aren't licensing with
17 you, did they sue you?

18 A. No.

19 Q. One more thing. On Exhibit 4, that's the letter from
20 Rural's lawyer to you, there is a second page to that
letter, is there, to Exhibit 4?

22 A. Yes.

23 Q. And what is that?

24 A. That is your answer apparently.

25 Q. Okay. From the second paragraph of that letter, this

[Transcript p. 65]

1 is the letter from Feist's lawyer to Rural's lawyer,
2 "Would be helpful to me if either you or Mr. Austerman
3 would forward me a list of the alleged copyright
4 infringements together with the sample of the two
5 directories with these infringements marked and a
6 partial list of the Rural subscribers, subscriber
7 witnesses who allegedly were not contacted by Feist."

8 Did Rural ever supply you a list of copyright
9 infringements of subscribers who were not contacted?

10 A. No, they did not.

11 Q. So for all you know you weren't violating their
12 copyright?

13 A. Correct.

[Transcript p. 67]

[Recross by Mr. Caplinger]

1 Q. (Mr. Caplinger) Mr. Feist, want to make sure we clear
up for the court,

2 judge asked you whether in 1978 when you approached
3 Rural whether Rural licensed with other companies.
4 Remember that question?

5 A. (Mr. Feist) Yes.

6 Q. Just want to make sure, do you have any knowledge
of
7 whether Rural Telephone had license agreements
with
8 other telephone companies at that time?

9 A. No.

20 Q. Do you have any personal knowledge of whether
Rural
21 licensed with any other telephone directory publish-
ing
22 companies between 1978 and today besides the
Gronseth Directory that you testified to?

24 A. I am not aware of it.

[Transcript p. 69]

25 Q. And in that area of fictitious listings that were

[Transcript p. 70]

1 included in Rural's book that later in part were
2 included in your '83 directory, I believe your
3 testimony earlier was you don't know how that hap-
pened?

4 A. Correct.

5 Q. And if that's — if it is possible you don't know how
6 it happened, then it would be possible, would it not,
7 that Feist copied portions of Rural's telephone
8 directory without verifying?

9 A. No.

10 Q. And can you qualify that answer?

11 A. That's right, since I don't know how it happened,
12 because there are the verifications. All you will need
13 to do is look at them. Those listings, four listings
14 you are referring to were taken out, initialed by our
15 verifiers, they were not in there. All I can answer is
16 I don't know how they — somewhere, somewhere
along the
17 line in one of those steps somebody inserted those
18 listings. That is the only conclusion. How or why we
19 don't know.

[Transcript p. 72]

5 Q. (Mr. Caplinger) You stated that Rural Telephone to
the
6 best of your knowledge has a license agreement with
one
7 other publishing company, correct?

8 A. To my knowledge, yes.

9 Q. And in 1978 when you approached Rural Telephone,
10 attempting to buy those listings, how many did you
11 offer to pay Rural Telephone for those?

12 A. The standard rate which we have always offered
every

13 telephone company, every independent telephone
company,

14 I think it was ten cents a listing at that time.

15 Q. Okay. And in 1980 when your attorney responded
through
16 correspondence to our letter of March 20, 1980, was
17 there discussion between the parties as to entering
18 into a license agreement at that time?

19 A. Yes.

20 Q. And what was the amount that you were willing to
pay
21 for the license agreement from Rural at that time?

22 MR. KNOBBE: Object, the issue of whether
they
23 refuse to license is not an issue. We alleged it in
24 counterclaim, and they admitted it. It is an
admitted fact Rural has refused to license, period.

(Transcript p. 73)

1 MR. CAPLINGER: His response has made it
an issue
2 in this hearing that we have refused.

3 THE COURT: Perhaps I better have the full
4 picture here. Go ahead.
5 Q. (Mr. Caplinger) What amount were you willing to
pay?

6 A. I don't recall.

7 Q. Ten cents?

8 A. I do not recall.

9 Q. The same ten cents that was in 1978?

10 A. What year?

11 Q. Well, strike that. What were you paying other
telephone companies that you were licensing with in
13 1980?
14 A. Depending on the term of the contract, whether it was
15 one year, three year, five year or eight year.

16 Q. Okay.

17 A. Contract.

18 Q. And how much are you, how much are you paying
telephone
19 companies today?

20 A. Depending on the term.

21 Q. What is that?

22 A. One year is 15 cents per listing per year. Three
years, three year contract is 15 cents per listing per
year plus a thousand dollars. Five year I believe is
25 \$800.00 implementation fee plus 15 cents per listing

[Transcript p. 74]

1 per year, and eight year is 35 cents per listing per
2 year plus I think a thousand dollars implementation
3 fee.

4 Q. So if Rural were to license with you today, what would
5 you pay them?

6 A. That is what we would pay them.

7 Q. 15 cents?

8 A. Whichever one they choose. It is their option.

9 Q. You made reference to the agreement between Rural
10 Telephone and the other publishing company that
they

11 have a license agreement with, and can you look at
12 that, and tell me what they are paying Rural Tele-
phone?

13 A. Per listing?

[Transcript p. 75]

4 Q. (Mr. Caplinger) What is Rural Telephone being paid
per
5 listing?

6 A. Fifty cents, depending on what service they get.

[Transcript p. 76]

(Re-Examination by Mr. Knobbe)

1 Q. (Mr. Knobbe) Have you always offered to license with
Rural on the
2 same terms as you have offered every other phone

3 company?

4 A. (Mr. Feist) Yes.

[Further Re-Cross Examination by Mr. Caplinger]

18 Q. (Mr. Caplinger) Mr. Feist, how much do you pay
Continental Telephone

19 presently for white page listings?

20 A. (Mr. Feist) I am not certain, 35 cents I think.

21 Q. Do you pay anybody else out there more than 35
cents?

22 A. We may pay United 40, 45.

23 Q. Do you recall ever offering Rural Telephone 35 cents?

24 A. No.

25 Q. Or the 45 cents?

[Transcript p. 77]

1 A. No.

2 Q. Do you recall ever offering them anything more than
10

3 or 15 cents?

4 A. At one time there was some talk. I think we threw a
5 figure at them which was, I don't know, I don't recall
6 what it was, but it was whatever the going rate was at
7 that particular time.

[Transcript p. 78]

[Cross Examination of Larry Sevier, manager of
Rural Telephone Service Company, Inc. by Kyler Knobbe]

11 Q. (Mr. Knobbe) I assume you are familiar with this case,
Mr. Sevier?

12 A. (Mr. Sevier) Familiar.

13 Q. Have you read the documents in the case?

14 A. No.

15 Q. Have you read the letter from Mr. Caplinger to Feist
16 Publications dated March 20 of 1980?

17 A. No.

18 Q. I hand you what has been marked Exhibit 4. Review
it.

19 Direct your attention to paragraph two. I am having
20 difficulty here. I look at paragraph two, it says

21 Feist infringed Rural's copyright in printed and
22 unlisted numbers. Now did Feist copy that unlisted
23 number from Rural's directory?

24 MR. CAPLINGER: Objection, this witness just
25 became manager of Rural Telephone Company in
January 1

[Transcript p. 79]
1 of 1986. He is not even from western Kansas. He just
2 testified that he, before today, before looking at the
3 letter, he has not read it. I don't see how he can be
4 expected to answer questions about it.

5 THE COURT: If he can't answer it, he can tell
us.

6 A. (Mr. Sevier) Okay, what was your question?
7 Q. (Mr. Knobbe) Did Feist copy that unlisted number
from
8 your telephone directory?
9 A. I have no idea whether you did that or not.
10 Q. Do unlisted numbers appear in your telephone di-
rectory?
11 A. Not normally.
12 Q. Okay. Mr. Sevier, I am going to hand you — let's see,
13 I don't think there is any question here.
14 (Off the record discussion.)
15 Q. All I have done in house is save us a little time by
16 marking a page and a name that I want you to refer
to,
17 so we are not going to spend a ton of time fumbling
18 around. That is the pages that I will be referring to
19 out of Exhibit 1, pages from Exhibit 2.

20 Exhibit 1 is the Rural directory, Exhibit 2 is
21 Feist directory. Would you please look up Mark and
22 Cindy Anderson, A-N-D-E-R-S-O-N?

23 A. Okay.
24 Q. All right. You are looking at Exhibit 1, the Rural
25 directory?

[Transcript p. 80]

- 1 A. Yes.
- 2 Q. All right. What is their address?
- 3 A. Rexford.
- 4 Q. Would you please refer to Exhibit 2, and look up Mark
- 5 and Cindy Anderson. For your benefit it is the first
- 6 paper clip. Do you have that?
- 7 A. Yes.
- 8 Q. What is their address in Exhibit 2?
- 9 A. Rural Route 1 Box 89, Menlo.
- 10 Q. Did Feist copy that address from Rural's directory?
- 11 A. It does not appear that way.
- 12 Q. Mr. Sevier, at the second paper clip would you look up
- 13 please, Jan Bretz, B-R-E-T-Z. In Exhibit 1, Rural
- 14 directory. What is the phone number for Jan Bretz?
- 15 A. 627-4695.
- 16 Q. Would you please look up Jan Bretz in Exhibit 2, the
- 17 Feist directory?
- 18 A. Okay.
- 19 Q. Can you read that phone number?
- 20 A. 627-4980.
- 21 Q. Are those the same?
- 22 A. No.
- 23 Q. Did Feist copy that phone number from the Rural
- 24 directory?
- 25 A. Evidently not.

[Transcript p. 81]

- 1 Q. Mr. Sevier, please look up Alfred Desair, D-E-S-A-I-R,
- 2 in Exhibit 1, the Rural directory.
- 3 A. Okay.
- 4 Q. And what is Mr. Desair's wife's name?
- 5 A. Forena.
- 6 Q. Spell that.
- 7 A. F-O-R-E-N-A.
- 8 Q. Would you please look up Mr. Desair in Exhibit 2, the
- 9 Feist directory. What is his wife's name?
- 10 A. Lorena.
- 11 Q. Please spell that.

- 12 A. L-O-R-E-N-A.
13 Q. Not F-O-R-E-N-A.
14 A. Right.
15 Q. It was different?
16 A. The two differ.
17 Q. Did Feist copy that wife's name from the Rural
18 directory?
19 A. Evidently not.
20 Q. Would you please look up Mrs. Josaphine Fiala.
21 F-I-A-L-A. I suggest you look in Exhibit 2 first, the
22 Feist directory. Do you find that listing?
23 A. Yes.
24 Q. Is there an address for Mrs. Fiala?
25 A. Yes.

[Transcript p. 82]

- 1 Q. What is that address?
2 A. Jennings.
3 Q. And a phone number?
4 A. 678-2449.
5 Q. That address and number within your exchange area,
6 within the Rural exchange area?
7 A. The address is, yes.
8 Q. The phone number is not?
9 A. Well, I would have to check the phone number.
10 Q. Is Jennings serviced by you?
11 A. Yes.
12 Q. Would you look up Mrs. Josaphine Fiala in Exhibit 1.
I
13 put a mark where she should be.
14 A. Okay, I haven't looked it up. I don't see it.
15 Q. Her listing does not appear in Exhibit 1, is that
16 correct?
17 A. It does not appear in alphabetical order that I am
18 looking at.
19 Q. Did Feist copy that listing from the Rural directory?
20 A. Evidently not.
21 Q. I am not going to put the court asleep. Do you realize
22 I can do this 3600 more times with those two

- 23 directories?
24 A. No, I don't.
25 Q. Mr. Sevier, when a person gets a phone number, that
[Transcript p. 83]
1 numbers originates with Rural, doesn't it?
2 A. Yes.
3 Q. Rural assigns the person the number?
4 A. Right.
5 Q. They are the only place to get the number?
6 A. In our jurisdiction, yes.
7 Q. and you can change that phone number?
8 A. Yes.
9 Q. So would it be fair to say that Rural is the source of
10 that phone number?
11 A. Yes.
12 Q. When Rural compiles its directory, it doesn't make a
13 house to house survey, does it?
14 A. When we compile our directory from year to year, or
15 from the beginning?
16 Q. When you compile your directory from year to year,
you
17 don't make a house to house survey, do you?
18 A. When we compile our directory from year to year, we
do
19 not make a house to house survey. We have our new
20 customers come in and make application to us. We
21 assign them a phone number, and then we update our
22 records.
23 Q. You don't even have to go to them. They come to you,
24 right?
25 A. We have to go to them, yes.

[Transcript p. 84]

- 1 Q. You have to go to them, say I want to sell you a phone
2 need your listing and your number to put in the
3 directory?
4 A. We do not go to them to get a number for the directory.
5 However, one major difference we need to understand

6 here, we provide telephone service in our area. We
7 must go to them to connect their telephone service. At
8 the same time we assign them a directory number. We
do
9 end up going to them, yes.

10 Q. To provide the phone service?

11 A. Yes.

12 Q. Not to compile a directory?

13 A. Well, it is all one in the same with us. We compile
14 our directory and provide phone service.

15 Q. Do you do a phone dialing survey of your subscribers
16 before you compile a directory?

17 A. For compiling a directory, or for —

18 Q. Before you compile one.

19 A. No.

[Direct Examination by Mr Caplinger]

23 Q. (Mr. Caplinger) Just have several questions for you,
Mr. Sevier.

24 Looking at the same two exhibits counselor handed
you,

25 Exhibits 1 and 2, with 1 being Rural's, and 2 being

[Transcript p. 85]

1 their 1983 directory, on page one of Exhibit 1, Rural's
2 directory, you find Anderson Andrew Gove, 938-2317?

3 A. (Mr. Sevier) Yes.

4 Q. Okay, and then in their directory you find Anderson
5 Andrew Gove 938-2317?

6 A. Yes.

7 Q. Are those two identical?

8 A. Yes.

9 Q. Can you tell me whether Feist copied that information
10 out of Rural's telephone directory?

11 MR. KNOBBE: Objection, he has no personal
knowledge of Feist's action.

13 MR. CAPLINGER: Asking the same question
you asked
14 of this individual.

15 THE COURT: Well, go ahead. It won't hurt.

16 A. Okay, it appears evidently that they did copy out of
17 the directory.

18 Q. (Mr. Caplinger) Okay, and were you in the courtroom
19 this morning when Mr. Tom Feist took the stand?

20 A. Yes.

21 Q. And did you hear him testify that in 1978 they in fact
22 used Rural Telephone's directory?

23 A. Yes.

24 Q. This Exhibit 1, Exhibit 2 Mr. Knobbe asked you
25 questions about, you are aware that is the '83

[Transcript p. 86]

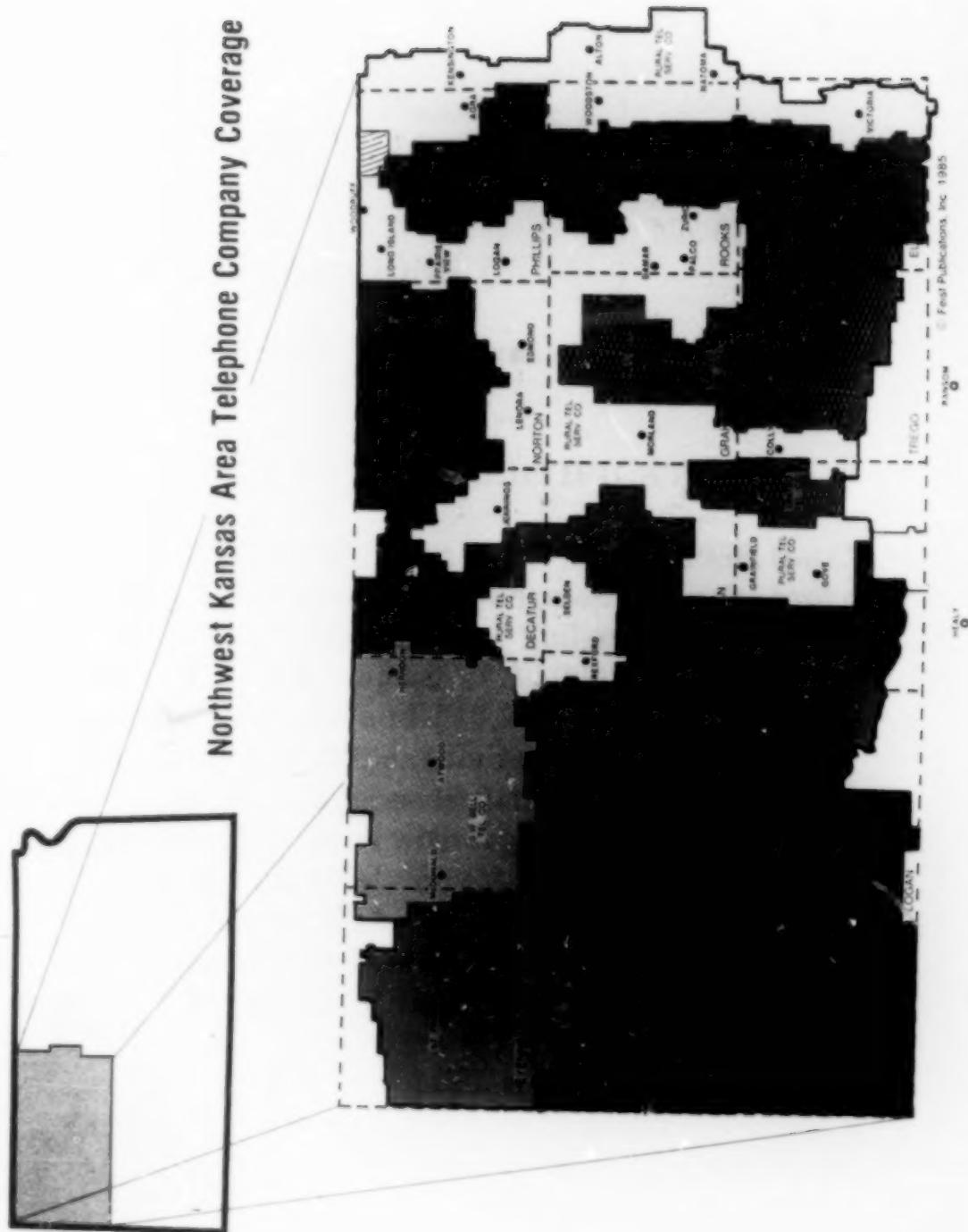
1 directory, correct?

2 A. I wasn't aware, no.

3 Q. So in other words, in your opinion, it is possible that
4 in 1978 they copied the information, and in the next
5 five years they could have amended it, and added
6 things, that is why the difference?

7 A. It is possible.

Northwest Kansas Area Telephone Company Coverage



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RURAL TELEPHONE SERVICE)
COMPANY, INC.,)
)
 Plaintiff,)
)
 v.) Civil Action
) No. 83-4086-R
FEIST PUBLICATIONS, INC.)
)
 Defendant.)
)

RULE 54 (b) CERTIFICATION

NOW ON THIS 21st day of March, 1988, the Court directs the entry of a final judgment as to the copyright infringement claim herein. Judgment is entered for plaintiff in the amount of \$6,000 on a copyright infringement claim and \$15,280 attorney's fees on the copyright infringement claim.

The Court expressly determines that there is no just reason for delay with regard to the copyright claim herein and expressly directs the Clerk to enter judgment as set forth above. Every issue in the copyright part of this matter is final as to the claim of both parties.

IT IS SO ORDERED.

/s/ Richard D. Rogers
Richard D. Rogers
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

JUDGEMENT IN A CIVIL CASE

RURAL TELEPHONE SERVICE
COMPANY, INC.

Plaintiff,

v.
FEIST PUBLICATIONS, INC.,

Defendant.

CASE NUMBER: 83-4086-R

Decision by Court. This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered for plaintiff in the amount of \$6,000 on a copyright infringement claim and \$15,280 attorney's fees on the copyright infringement claim.

(EOD 03/22/88)

March 22, 1988

Date

RALPH L. DeLOACH

Clerk

/s/ C. Masters
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RURAL TELEPHONE SERVICE)
COMPANY, INC.,)
Plaintiff,)
v.) Civil Action
FEIST PUBLICATIONS, INC.) No. 83-4086-R
Defendant.)

NOTICE OF APPEAL

Notice is hereby given that Feist Publications, Inc., defendant above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final judgment entered in this action on the 22nd day of March 1988.

April 18, 1988

Respectfully submitted

/s/ Kyler Knobbe
Kyler Knobbe
Box 808
Cimarron, Kansas 67835
(316) 855-3492
Lawyer for Defendant

OF COUNSEL:

Ridenour And Knobbe
Box 808
Cimarron, Kansas 67835
(316) 855-3492

IN THE SUPREME COURT
OF THE UNITED STATES

No. 89-1909

Feist Publications, Inc.,
Petitioner

Rural Telephone Service Company, Inc.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI to
the United States Court of Appeals for the Tenth Circuit

The motion of Association of North American Directory Publishers, et al. for leave to file a brief as amicus curiae is granted. The petition for a writ of certiorari is granted, limited to Question 3 presented by the petition.

October 1, 1990